

Market definition in buyer power cases: revisiting some traditional views¹

- Working paper -

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Abstract

Market definition and market power assessment are two fundamental steps carried out by competition authorities – and later on reviewed by courts – whenever dealing with alleged breaches of competition law by undertakings. They are, however, mostly centered in selling side cases. This paper puts forward that a mere reverse of the standard methodologies employed for selling side cases are insufficient for the application in buyer side cases. Thus, it is necessary re-assessing the current techniques and their application to be applied to buyer power cases. I submit that in all buyer power cases the market definition ought to be made in both the upstream market and downstream market by adopting a dualistic market definition in buyer power cases. Particular attention ought to be paid to the circumstance of whether the undertaking has market power in the downstream market as this will directly affect whether the conduct is anticompetitive or not. Lastly, this dualistic definition is justified as it fully captures the competitive effects of monopsony or bargaining power and allows for a proper appreciation of buyer power's welfare effects from a consumer's perspective.

Keywords:

Buyer power, market definition, market power, competition law, competition policy

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1. Market definition in buyer power cases, revisiting the traditional methodologies

1.1. Introduction

EU competition law has traditionally not devoted particular attention to the development of a coherent and detailed methodology for defining buyer markets;² instead it has resorted to mere reverses of selling side market definition. A suitable explanation for the lack of a specific methodology is twofold. Firstly, there have been few buyer power cases in EU competition law, and secondly, there is some unawareness concerning the need of a specific buyer power market definition methodology. As a response, limited attempts by international institutions, including the Commission, and literature have attempted to suggest adopting a proper methodology defining buyer markets. In this section I propose revising the current market definition methodologies and the suggestions hitherto made for buyer power cases by highlighting their shortcomings. My central contribution is centered on the adoption of a dualistic approach to buyer's market definition that fully captures buyer market power and its effects in the upstream and downstream markets by defining the market in which the buyer acquires its input and the market in which it sells its output.

The main reason behind the dualistic approach to market definition in buyer power are that buyer power cases, unlike exploitative seller-side cases, have repercussions on at least two markets where the buyer carries out its economic activity.³ Buyer power directly impacts the competitive conditions in the upstream market between the suppliers and, additionally, it may impact - positively or negatively- the downstream market and the relations between the buyer-retailer and end consumers.⁴ Secondly, and as expressed by Carstensen, buying markets and buyers' incentives differ from seller markets. Buyers are the ones deciding what to buy, when to buy, from whom to buy and how to pay for the input, enjoying a discretionary power that sellers

² A similar view is expressed by Füller when stating: "The problems of seller power mirrored in buyer power: However, European practice has heretofore not yet developed a coherent concept for defining buyer markets", in J. Füller, Market Definition in Günther Hirsch, Frank Montag and Franz Jürgen Säcker, *Competition law: European community practice and procedure : article-by-article commentary* (Sweet & Maxwell 2008) 449. See also: Dennis W. Carlton and Mark Israel, 'Proper Treatment of Buyer Power in Merger Review' 39 *Review of Industrial Organization* [2011] Antonio Buttà and Andrea Pezzoli, 'Buyer power and competition policy: from brick-and-mortar retailers to digital platforms' 41 *Economia E Politica Industriale* [2014].

³ Cf with Buttà and Pezzoli [2014] 161, who name this effects vertical and horizontal.

⁴ Peter C. Carstensen, 'Buyer Power and the Horizontal Merger Guidelines: Minor Progress on an Important Issue' 14 *University of Pennsylvania Journal of Business Law* [2012].

usually lack.⁵ This implies that a buyer (or group of coordinated buyers) may enjoy substantial purchasing power from smaller market shares than when compared to sellers,⁶ as confirmed by the Commission in *Carrefour/Promodes*⁷ and *Rewe/Meinl*.⁸ Thirdly, the interpretation of the traditional assessment tools for determining the market power of a buying undertaking must take into account these realities or otherwise, if using traditional seller-side metrics, the analysis may lead to the erroneous conclusion that substantial buyer power does not exist when in reality it does.

This paper explores the concepts of market definition and market power assessment from a buyer-side perspective by answering the following sub-research questions: *i) is the definition of purchasing relevant markets different from seller oriented cases?; ii) if this is the case, what is the source of the difference?; iii) is buyer market power different from seller market power?; iv) is there a necessity of revisiting the methodologies defining purchasing markets?; v) if yes, how and what it consists of? vi) does substantive buyer market power arises in under different circumstances than seller market power? vi) how can buyer market power be assessed?*

To answer these questions I have organized this chapters organized as follows: Section 1.2 discusses the concept of market definition and its role in EU competition law and analyzes its applicability in its different thematic spheres. Section 1.3 proposes adopting a dualistic market approach for purchasing markets as an adequate methodology for buyer power cases that goes beyond the traditional reverse methodology. Subsequently, in Sections 1.4 and 1.5 I analyze the relevant market and assessment of buyer market power, respectively, as part of the dualistic methodology by analyzing and criticism the existing methodologies. Section 1.6 discusses other alternatives for directly determining purchasing markets. Lastly, Section 1.7 provides concludes the paper with a summary of the findings and some *de lege lata* and *de lege ferenda* discussions.

⁵ Peter C. Carstensen, ‘Buyer Power and Merger Analysis—The Need for Different Metrics’ (Workshop on Merger Enforcement held by the Antitrust Division and the Federal Trade Commission); Peter C. Carstensen, ‘Buyer Cartels Versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy’ 1 *William & Mary Business Law Review* [2010]; Carstensen, ‘Buyer Power and the Horizontal Merger Guidelines: Minor Progress on an Important Issue’ [2012].

⁶ Paul W Dobson, ‘Exploiting Buyer Power: Lessons from the British Grocery Trade’ 72 *Antitrust Law Journal* [2004-2005]; Carstensen, ‘Buyer Cartels Versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy’ [2010] 6; Buttà and Pezzoli [2014] 165

⁷ Commission Decision COMP/M. 1684 – Carrefour/Promodes, [2000], French public version, paras 52-55.

⁸ Commission Decision IV/M.1221 — Rewe/Meinl [1999] OJ L274/1, para 101.

1.2. Market definition

Market definition is a tool that identifies and defines the boundaries of competition and competitive relations between undertakings⁹ by determining which are the competitive constraints faced by the undertaking(s) involved in a competition case.¹⁰ By doing so the type of case is clarified and the assessment of the anticompetitive effects is facilitated.¹¹ As such, market definition is a first step to determine whether a firm possesses substantive market power that then will serve to evaluate the anti-competitiveness of the conduct.¹² This assessment of competitive constraints can be carried out regardless of whether the undertaking acts as a buyer or as a seller in a given market. Lastly, market definition is employed across all the different areas of competition law – i.e.: dominance, merger and agreement cases- , with some minor adjustments and in different degrees of importance as discussed in Section 1.1.1.

EU law adopts a structural approach to assess market power by distinguishing two phases: the definition of the relevant market and the market power assessment.¹³ This two tier structure was imprinted by the ECJ case law in *Continental Can* where the ECJ stressed the importance and pre-requisite of defining the relevant market to then assess if the undertaking is dominant or not, or if a concentration would lead to the creation or strengthening of a dominant position.¹⁴ In the

⁹ Commission Notice on the Definition of the Relevant Market for the Purposes of the Community Competition Law [1997] OJ C372/5, para 2. See also Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, para 10; also highlighting the characteristic of a tool see: Robert G. Harris and Thomas M. Jorde, ‘Antitrust Market Definition: An Integrated Approach’ 72 California Law Review [1984]; Füller in Hirsch, Montag and Säcker, 437; Jonathan B. Baker, ‘Market Definition: An Analytical Overview’ 74 Antitrust Law Journal [2007]; Jonathan Faull and Ali Nikpay, *The EC law of competition* (Oxford University Press 1999) para 1.136; Dennis W. Carlton, ‘Market Definition: Use and Abuse’ 3 Competition Policy International [2007].

¹⁰ OECD, ‘Policy Roundtables: Market Definition’ [2012]; P. Areeda, Herbert Hovenkamp and J. Solow, *Antitrust Law: An analysis of Antitrust Principles and Their Application* vol IIB (3rd edn, Wolters Kluwer 1995) 225; Mika Oinonen, *Does EU merger control discriminate against small markets companies?: diagnosing the argument with conclusions* (Kluwer Law International 2010) 236

¹¹ Gregory J. Werden, ‘The Relevant Market: Possible And Productive’ April 2014 Antitrust Law Journal Online [2014].

¹² Commission Notice on the Definition of the Relevant Market for the Purposes of the Community Competition Law [1997] OJ C372/5, para 2; Massimo Motta, *Competition policy: theory and practice* (Cambridge University Press 2004) 101; Carlton [2007] 5; Richard Whish and David Bailey, *Competition law* (Oxford University Press 2012) 28; Vivian Rose and David Bailey (eds), *Bellamy & Child: European Union Law of Competition* (Oxford University Press 2013) para 4.001

¹³ Faull and Nikpay, para 1.128; Gunnar Niels, Helen Jenkins and James Kavanagh, *Economics for competition lawyers* (Oxford University Press 2011) 25; Alison Jones and Brenda Sufrin, *EU competition law: text, cases, and materials* (Oxford University Press 2011) 62; OECD [2012] 26; Franz Jürgen Säcker, *The Concept of the relevant product market: between demand-side substitutability in supply-side substitutability in competition law* (Peter Lang 2008) 13; J. Cook and C. S. Kerse, *EC merger control* (Sweet & Maxwell 2009) 216; Roger J. van den Bergh and Peter D. Camesasca, *European competition law and economics: a comparative perspective* (Sweet & Maxwell 2006) 76; Motta, 101; Oinonen, 150; Harris and Jorde [1984] 4.

¹⁴ C-6/72 - *Europemballage Corporation and Continental Can Company v Commission*, EU:C:1973:22 E.C.R. [1973] 00215, para 32.

structural approach, firstly, the market is defined in both its product and geographical dimension by taking into account supply and demand substitutability. This definition ought to be sequential – first the product market and then the geographical market. Otherwise, as noted by Crocioni a price increase in an area would “lead to simultaneous switching to both substitute products and other locations”.¹⁵ The competitive forces part of relevant product and geographic market are of the main importance for the case, whereas outside forces only play a secondary role.¹⁶ Secondly and subsequently, the undertaking’s market power is assessed by recourse to different indicators, such as market shares entry barriers, potential competition, demand substitutability and supply substitutability.¹⁷ This structural approach has been imprinted by the EU judiciary in its case law since the beginning of EU competition law,¹⁸ and adopted by the Commission in its guidelines and practice,¹⁹

Additionally, some commentators such as Jones and Sufrin, as well as Oinonen, add the caveat that market definition follows an indirect approach.²⁰ I interpret this as implying that the approach is indirect as there are alternative methods to directly assess the market power of an undertaking without firstly defining the relevant market and then assessment the market power based on the relevant market’s outcome. I look at those alternative methods from a buyer-oriented perspective in Section 1.5.

1.2.1. Scope of application

Market definition plays a role in all spheres of EU competition law, with major or minor importance, as well as with a backward or forward looking, depending on the type of case. In the following paragraphs I discuss in detail the main differences in the analysis among the areas of EU competition law.

Concerning agreement cases under the scope of Article 101 TFEU, market definition plays a lesser role and the Commission may find an infringement of Art. 101 TFEU without arriving to a full definition of the relevant market.²¹ Practice shows that in most cases, it is implicitly assumed that if the infringement is anticompetitive by object the market definition is not needed as neither

¹⁵ Pietro Crocioni, ‘The hypothetical monopolist test: what it can and cannot tell you’ 23 *European Competition Law Review* [2002]

¹⁶ Werden [2014] 2

¹⁷ Commission Notice on the Definition of the Relevant Market for the Purposes of the Community Competition Law [1997] OJ C372/5, para 13-24.

¹⁸ C-6/72 - *Europemballage Corporation and Continental Can Company v Commission*, EU:C:1973:22 E.C.R. [1973] 00215, para 32.

¹⁹ Commission Notice on the Definition of the Relevant Market for the Purposes of the Community Competition Law [1997] OJ C372/5.

²⁰ Jones and Sufrin, 63; Oinonen, 153.

²¹ Rose and Bailey para 4.006

market power requirement nor anticompetitive effects ought to be present, as confirmed by the ECJ in *C-226/11 - Expedia*.²² However, and as recently confirmed by the ECJ in *CB v Commission* in an object infringement the assessment must pay attention to the “content of its provisions, its objectives and the economic and legal context of which it forms a part” which implies a minimal economic assessment of the case, leaving the door open for an interpretation that requires a basic market definition.²³ I, however, think that such interpretation is not correct.

However, the authorities will carry out a detailed market definition with the “sole purpose of defining the relevant market, in order to apply Article [101](1) TFEU, is to determine whether the agreement in question may harm trade between Member States and has as its object or effect the prevention, restriction or distortion of competition within the common market”,²⁴ particularly if the case under investigation deals with an effect based restriction of competition,²⁵ as these must have an appreciable or perceptible effect on trade between Member States, as demanded by the GC in *Compagnie générale maritime and Others v Commission* and *European Night Services and Others v Commission*, and ratified by the ECJ in *Delimitis*.²⁶ In other words, to have an appreciable effect on trade the undertakings must enjoy a sufficient degree of market power

²² C-226/11 – *Expedia*, EU:C:2012:795 [2012], para 35; Füller in Hirsch, Montag and Säcker, 440; Also of this opinion is Vogel when stating “supervisory authorities traditionally consider that, by its mere existence, an agreement implies that the parties intend to coordinate or consolidate their monopoly power. So defining the relevant market is not as important in the law on restrictive agreements as it is for the rules of on dominant positions”, Louis Vogel, *European Competition Law* (Law Lex 2012) 55. See also: Hanno Wollmann, ‘Horizontal Restraints of Competition’ in Günter Hirsch, Franz Montag and Franz Jürgen Säcker (eds), *Competition Law: European Community Practice and Procedure* (Thomson - Sweet & Maxwell 2008) 495 In US Antitrust the solution is somewhat similar as except for violations that are per se illegal, any other type of antitrust offence requires the plaintiff to plead and prove the relevant market, see for more: American Bar Association, *Market Definition in Antitrust* (American Bar Association ed, 2012) 2.

²³ C-67/13 P - *CB v Commission*, EU:C:2014:2204 [2014] not yet published in the Courts Report, para 53. Cf with Commission Decision relating to a proceeding under Article 81 of the EC Treaty and Article 53 of the EEA Agreement COMP/39181 – *Candle Waxes* [2008], para 279.

²⁴ T-357/06 - *Koninklijke Wegenbouw Stevin v Commission*, EU:T:2012:488 [2012], para 135.

²⁵ Whish and Bailey, 28

²⁶ C-234/89 - *Delimitis v Henninger Bräu*, EU:C:1991:91 E.C.R. [1991] I-00935, para 16, in which the ECJ requires determining the relevant market in the assessment of the compatibility of exclusive supply agreements with Art. 101 TFEU; T-86/95 - *Compagnie générale maritime and Others v Commission*, EU:T:2002:50 E.C.R. [2002] II-01011, para 116; T-374/94 - *European Night Services and Others v Commission*, EU:T:1998:198 E.C.R. [1998] II-03141, para 93 and ss, where the GC annulled the Commission’s decision based on the absence of the analysis of the relevant market and the inclusion of the market shares of the involved undertaking. See also: Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1, para 43. In the literature, see: Ivo Van Bael and Jean-François Bellis, *Competition law of the European Community* (4th edn, Kluwer Law International 2005) 132; Lennart Ritter and W. David Braun, *European competition law: a practitioner's guide* / Lennart Ritter, W. David Braun (3rd edn, Kluwer Law International 2004) 24. In US Antitrust some type of cartel cases courts require showing that the defendant has a certain amount of market power, see: Herbert Hovenkamp, *Federal antitrust policy: the law of competition and its practice* (3rd edn, Thomson/West 2005) 80

present.²⁷ In those circumstances the Commission or the NCA has a duty to define – backward looking - the relevant market when applying Art. 101(1) TFEU as confirmed by the case law.²⁸ Concerning Art. 101(3) TFEU, the relevant market definition is necessary to establish whether, in a given situation, the fourth condition laid down in Art. 101(3)(b)TFEU is met - if the agreement in question is liable to eliminate competition in respect of either a substantial part of the products in question - but not for the other three cumulative conditions.²⁹

With respect to dominance cases, market definition is a prerequisite.³⁰ Its purpose is determining whether the undertaking under investigation is dominant or not and it is carried out regarding the past and current situations.³¹ The application of Article 102 TFEU demands finding dominance in a given relevant market, as “before an abuse of a dominant position is ascertained, it is necessary to establish the existence of a dominant position in a given market, which presupposes that such a market has already been defined”.³² Thus, dominance does not occur *in abstracto* but *in concreto*.

For concentration cases “a proper definition market of the relevant market is a necessary precondition for any assessment of the effect of a concentration in competition” as held by the ECJ in *Kali und Salz*.³³ The particular aim is identifying in a systematic manner the immediate competitive constraints facing the merging entity.³⁴ Then, an assessment is made and the merger will be considered compatible when it does not lead to a significant impediment of effective competition, in particular but not necessarily as required under the previous merger control

²⁷ This was clarified by the ECJ in *Expedia*, when it stated that: “16. It is settled case-law that an agreement of undertakings falls outside the prohibition in that provision, however, if it has only an insignificant effect on the market (...). 17 Accordingly, if it is to fall within the scope of the prohibition under Article 101(1) TFEU, an agreement of undertakings must have the object or effect of **perceptibly restricting competition** within the common market and be capable of affecting trade between Member States(...)” C-226/11 – *Expedia*, EU:C:2012:795 [2012], para 16-17 (emphasis added). See: Communication from the Commission Notice on Agreements of Minor Importance which do not Appreciably Restrict Competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice), [2014] OJ C291/1, para 2. See also: Jones and Sufirin, 62 and 63; Wolf Sauter and Johan Van de Groden, ‘Taking the Temperature: A Survey of the EU Law on Competition and State Aid in the Healthcare Sector’ 2010 Tilburg Law and Economics Center (TILEC) Law and Economics Discussion Paper No 2010-38 [2010]; a similar approach is undertaken in US Antitrust regarding Section 1 cases of the Sherman Act, see: Werden [2014] 4.

²⁸ T-357/06 - *Koninklijke Wegenbouw Stevin v Commission*, EU:T:2012:488 [2012], para 137; T-62/98 - *Volkswagen v Commission*, EU:T:2000:180 E.C.R. [2000] II-02707, para 230; T-44/00 - *Mannesmannröhren-Werke v Commission*, EU:T:2004:218 E.C.R. [2004] II-02223, para 132.

²⁹ T-213/00 - *CMA CGM and Others v Commission*, EU:T:2003:76 E.C.R. [2003] II-00913, para 226; and ratified in T-357/06 - *Koninklijke Wegenbouw Stevin v Commission*, EU:T:2012:488 [2012], para 138.

³⁰ T-62/98 - *Volkswagen v Commission*, EU:T:2000:180 E.C.R. [2000] II-02707, para 230.

³¹ Niels, Jenkins and Kavanagh, 30. In US Antitrust for cases under the scope of Section 2 of the Sherman Act market definition is employed to determine the existence of market power, see: Carlton [2007] 3.

³² T-62/98 - *Volkswagen v Commission*, EU:T:2000:180 E.C.R. [2000] II-02707, para 230.

³³ C-68/94 - *France and Société commerciale des potasses and de l'azote and Entreprise minière and chimique v Commission* (*Kali und Salz*), EU:C:1998:148, E.C.R. [1998] I-01375, para 143. See reiterating this approach in a buyer power scenario T-342/99 - *Airtours v Commission*, EU:T:2002:146 E.C.R. [2002] II-02585, para 19.

³⁴ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, para 10.

regime,³⁵ because of creating or strengthening a dominant position, in the common market or a substantial part of it.³⁶ This market definition is forward looking.³⁷

Backward and forward looking analysis.

Despite sharing methodologies for market definition, the relevant market and market power analysis in concentration cases is not identical to the one performed for dominance or agreement cases.³⁸ As mentioned, the goal of market definition in concentration is forward looking (prospective) as it aims at prediction whether a given merger or acquisition is likely to result in the creation or strengthening of a dominant position as confirmed by the General Court (“GC”) in *Tetra Laval v Commission*.³⁹ Whereas market definition in the assessment of Arts. 101 and 102 TFEU cases is past-looking (retrospective) as it determines the past and/or current existence of substantive market power enjoyed by the parties or the sole undertaking’s dominance, respectively. Extraordinarily, there may be cases of Art. 101 and 102 TFEU where the conduct has been planned but not yet executed and where competition authorities discover it before it has been carried out.⁴⁰ In such rare cases the exam should be forward looking.

The key difference between retrospective and prospective analysis is the determination of the appropriate comparison price.⁴¹ In retrospective cases (those where harm occurred) the analysis focuses on the “but-for-price”,⁴² this is the price that would have prevailed in the conduct’s

³⁵ Council Regulation (EEC) 4064/89 on the control of concentrations between undertakings [1989] OJ L 395, Art. 2.3.

³⁶ Council Regulation (EC) 139/2004 on the Control of Concentrations between Undertakings [2004] L 24/1, art. 2.3; Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, para 1.

³⁷ Niels, Jenkins and Kavanagh, 30.

³⁸ “The different time horizon considered in each case might lead to the result that different geographic markets are defined for the same products depending on whether the Commission is examining a change in the structure of supply, such as a concentration or a cooperative joint venture, or examining issues relating to certain past behavior.”, Commission Notice on the Definition of the Relevant Market for the Purposes of the Community Competition Law [1997] OJ C372/5, para 12. Also highlighting the different approach that market definition ought to employ depending on whether the harm is prospective or retrospective, see: Baker [2007] 389; Motta, 105; Ritter and Braun, 25; Christopher Bellamy, Graham D. Child and P. M. Roth, *European Community law of competition* (Sweet & Maxwell 2001) para 6.094; Cf with Vogel, 389.

³⁹ T-5/02 - *Tetra Laval v Commission*, EU:T:2002:264 E.C.R. [2002] II-04381, para 251. See a similar opinion in US Antitrust in Andrew Gavil, William Kovacic and Jonathan Baker, *Antitrust Law in Perspective: cases, concepts and problems in competition policy* (2nd edn, Thomson West 2008) 491. On the assessment of present and future market power, see: Areeda, Hovenkamp and Solow, 235.

⁴⁰ Also remarking this possibility is Carlton when stating «if the bad act has not yet taken effect, the current price can be used as the benchmark price.”, in Carlton [2007] 20.

⁴¹ Baker [2007] 159 and 160; Carlton [2007] 19.

⁴² The but-for-price idea looks conceptually akin to the “competition as if” concept developed by Miksch and discussed at length in Ignacio Herrera Anchustegui, *Competition and Buyer Power Through an Ordoliberal Lens* (2015) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2579308.

absence.⁴³ In practice, the SSNIP test has to be compared to this “as-if” price, or run the risk of making the relevant market too large.⁴⁴ In these cases problems may arise when the dispute is anchored on the determination of what would have been this hypothetical price.⁴⁵ In prospective cases the analysis does not compare to a hypothetical price but to the current prevailing price in the market,⁴⁶ unless there are grounds to believe that after the concentration prices will be likely to be reduced. Another difference is that prospective market analysis tends to be broader as it takes into account future competitive conditions whereas retrospective analysis must not.⁴⁷

Despite these differences the Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings (“EU Horizontal Mergers Guidelines”) refers to the Notice on Market Definition as the instrument guiding the methodology for defining the relevant market as some considerations relevant to the relevant markets “may also be of importance for the competitive assessment of the merger”.⁴⁸

1.3. Buyer power market definition: a dualistic approach

By and large, the literature, case law and soft law, discuss determining the relevant market and market power by making reference to an undertaking(s) in the selling side. In contrast, there is much less debate on the methodologies for determining relevant purchasing markets. I submit that the traditional seller-oriented methodologies need to be adjusted for the analysis of purchasing relevant markets to avoid shortcomings and erroneous results. This revision demands taking into account the structure of competition in purchasing markets to adjust the traditional approach to market definition. As described by Carstensen, “buyer power analysis requires metrics that measure both power and effects grounded in the economic realities of the buying side of the market place.”⁴⁹ Adopting mere reverses will lead to errors when performing a market definition for a buying undertaking.⁵⁰ In contrast, most buyer power literature do not explicitly

⁴³ Motta does not use the “but-for-price” standard but rather the “competitive price”, which in my view is even more difficult to assess in practice in Motta, 105.

⁴⁴ Ibid.

⁴⁵ Well known is the case of the Cellophane fallacy, the conceptual error made by the US Supreme Court by overlooking the fact that firms that are already exercising market power may impose current prices that, if increased any further, would make the price increase unprofitable, in *United States v. E.I. du pont de Nemours & Co.*, 351 U.S. 377 [1956].

⁴⁶ Baker [2007] 159.

⁴⁷ Ritter and Braun, 25.

⁴⁸ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, para 10.

⁴⁹ Carstensen, ‘Buyer Power and Merger Analysis–The Need for Different Metrics’ 2; see also Carstensen, ‘Buyer Power and the Horizontal Merger Guidelines: Minor Progress on an Important Issue’ [2012] 777 to 778.

⁵⁰ See also the criticism by a report published by the Office of Fair Trading and elaborated by RBB Economics when stating that “(w)e would not advocate turning the hypothetical monopolist test on its head and attempting to define a market by applying a ‘hypothetical buyer group test’, i.e. asking whether a hypothetical buyer group could profitably

consider the definition of the downstream market and focus almost exclusively on the upstream market.⁵¹ For me this more traditional view focusing only on the definition of the upstream - purchasing market- is incomplete and erroneous because of being short-sighted. By doing so, the cases are assessed as mainly examples of monopsony power and transfer of wealth between suppliers and buyers. This approach hinders the assessment of bargaining power effects and the possible passing on of efficiencies downstream. Also, in the case of monopsony and bargaining power little regard is paid to the effects on the downstream competition if only the upstream market conditions are assessed. This trend, however, seems to be changing.⁵²

I propose that, in buyer power cases, the relevant market definition must be made in both the procurement market (upstream market) as well as in the consumer market (downstream market that may also be the market for the end consumer) in opposition to a single market because of the considerable differences between them. This dual market definition implies using different methodologies defining two interrelated markets,⁵³ which as recognized by Dobson is a complex exercise because it ought to consider the multiple contexts in which the undertaking operates.⁵⁴ Furthermore, the dualistic approach suggests performing the double market definition in all circumstances and not only for specific situations or spheres of EU competition.⁵⁵

From a conceptual perspective the dualistic approach advocates firstly performing the determination of the relevant market for all buyer power cases. Once the market has been determined it is then when the authorities must identify whether the case implies an exercise of monopsony or bargaining power, to then properly assess the existence of buyer market power and interpret the outcomes of the market definition. In other words, the dualistic approach does not suggest having different methodologies at the stage of defining the relevant market but it does

sustain prices below competitive levels”, in Office of Fair Trading, *The competitive effects of buyer groups* (2007) para 1.77

⁵¹ Focusing mostly exclusively on the upstream market analysis see, inter alia: Bundeskartellamt, *Buyer Power in Competition Law - Status and Perspectives* (2008) 5; Roger D. Blair and Jeffrey L. Harrison, *Monopsony in law and economics* (Cambridge University Press 2010) 62; Ioannis Kokkoris, ‘Buyer Power Assessment in Competition Law: A Boon or a Menace?’ 29 *World Competition* [2006]; Ioannis Kokkoris, ‘The concept of market definition and the SSNIP test in the merger appraisal’ 26 *European Competition Law Review* [2005]; Ioannis Kokkoris and Howard Shelanski, *EU merger control: a legal and economic analysis* (Oxford University Press 2014) 422 to 426; Areeda, Hovenkamp and Solow propose that “monopsony power can be estimated in the conventional antitrust way by defining a relevant buyer’s market and then estimating the defendant’s share of it”, in Areeda, Hovenkamp and Solow, 53.

⁵² See the dual approach suggested by the OECD and the contribution of some of its Members when distinguishing between monopsony and bargaining power for a market definition in OECD [2012]

⁵³ Also noting the interrelation between markets in buyer power cases see: Alberto Pera, ‘Assessment of buyer power in recent investigations and mergers’ (2010), available at: http://www.gop.it/doc_pubblicazioni/40_hjv4kr3vun_eng.pdf.

⁵⁴ Paul Walter Dobson, Relationship between buyer and seller in retailing: UK supermarkets in Paul Walter Dobson, ‘Relationship between buyer and seller power in retailing: UK supermarkets (2000) ’ in Bruce Lyons (ed), *Cases in European competition policy: the economic analysis* (Cambridge University Press 2009) 103

⁵⁵ Van Bael and Bellis, 147

argue for distinguishing if the behavior involves monopsony or bargaining power effects when assessing and interpreting the undertaking's market power.

Unlike traditional seller markets – in particular in the case of exploitative abuses –, buyer power cases necessary involve an effect in the upstream (purchasing market) and the downstream (selling market) because the undertaking that acquires goods and/or services⁵⁶ from its suppliers will sell or transform this input in its downstream market activity vis-à-vis a (most likely) final consumer.⁵⁷ This implies that buyer power market definition must analyze both the upstream and downstream markets to fully assess the market impact of the exercise of buyer power.⁵⁸ In other words, the market analysis ought to be done twice: once in the upstream market and another in the downstream market. With this I address the problem of the current methodology by capturing both monopsony and bargaining power effects by looking at the market consequences in all related markets upstream and downstream. The rationale behind this is intuitive and citing the OECD “if the buyer power comes from its gate keeping role, then what is more important than its shares of purchases in the upstream market is its *market power* and hence market share in the relevant downstream market. Identifying buyer power requires precise and careful market definition of the relevant downstream product and geographic markets to identify market power in distribution services provided by the buyer”.⁵⁹

The dualistic definition also follows a structural approach. Firstly, the relevant market upstream – the purchasing market- is defined and then the buying market power is assessed. Secondly, a market definition downstream –with the undertaking as a seller- is made, focusing on its market position as a seller. The methodology describing the market definition for a selling undertaking by applying the hypothetical monopolist test is well described in the literature and falls outside of the scope of this paper.⁶⁰ From a legal perspective the dualistic approach is grounded on the current state of EU competition law, as it has been recognized by the Merger Control Regulation when making explicit reference to the need for assessing the outcome of the operation in a

⁵⁶ For the sake of brevity and avoiding unnecessary repetition I employ in this paper, unless noted otherwise, the term “goods” as encompassing both products, works and services.

⁵⁷ Also supporting this view of the competitive risks in the upstream and downstream market in relation to purchasing agreements see: Carstensen, ‘Buyer Cartels Versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy’ [2010].

⁵⁸ Somewhat similarly and stressing the need for examine buyer power effects in the upstream and downstream market see: Pera 16.

⁵⁹ OECD, *Policy Roundtables: Monopsony and Buyer Power* (2009) 22

⁶⁰ For some interesting discussions suggesting adopting other methodologies or revisiting the current ones in see, inter alia: OECD, ‘Policy Roundtables: Market Definition’ [2012] 59 to 79; Adriaan ten Kate and Gunnar Niels, ‘The Relevant Market: A Concept Still in Search of a Definition’ 5 *Journal of Competition Law and Economics* [2009]; Crocioni [2002] ; Simon Baker and Andrea Lofaro, ‘Buyer power and the Enso/Stora decision’ 21 *European Competition Law Review* [2000]; Kokkoris [2005] ; John Vickers, ‘Market Power in Competition Cases’ 2 *European Competition Journal* [2006].

holistic manner and taken into account constraints and consequences upstream and downstream market:

“(…) (i)n making this appraisal, the Commission shall take into account:

(a) the need to maintain and develop effective competition within the common market in view of, among other things, *the structure of all the markets concerned* and the actual or potential competition from undertakings located either within or outwith the Community

(b) the *market position of the undertakings concerned* and their economic and financial power, *the alternatives available to suppliers and users*, their access to supplies or markets, any legal or other barriers to entry, *supply and demand trends* for the relevant goods and services, *the interests of the intermediate and ultimate consumers*, and the development of technical and economic progress provided that it is to consumers' advantage and does not form an obstacle to competition.”⁶¹

Commission's practice and the EU case law have also started to acknowledge and employ the dualistic approach on some occasions in Commission Decisions and has been tacitly ratified the EU judiciary, even if the discussions are indirect and still incipient.⁶²

Contrastingly, the acknowledgement of the dual approach to buyer power cases has been more timid with regards to the Commission's guidelines and policy instruments. This paper shows that the Commission has introduced a *moderated dualistic approach* on the Guidelines on Horizontal Agreements,⁶³ and the Commission Notice on Guidelines on Vertical Restraints (“Guidelines on Vertical Restraints”).⁶⁴

In the Guidelines on Horizontal Agreements the Commission correctly points out that a purchasing agreement –and in general buyer power- affects two markets: the purchasing market

⁶¹ Council Regulation (EC) 139/2004 on the Control of Concentrations between Undertakings [2004] L 24/1, art. 2.1.(a).(b) (emphasis added).

⁶² See Commission Decision relating to a proceeding under Article [102] TFEU IV/D-2/34.780 — Virgin/British Airways [2000] OJ L30/1; T-219/99 - *British Airways v Commission*, EU:T:2003:343 E.C.R. [2003] II-05917; and C-95/04P - *British Airways v Commission*, EU:C:2007:166 E.C.R. [2007] I-02331. See also in concentration cases, inter alia, Commission Decision IV/M.1221 — *Rewe/Meinl* [1999] OJ L274/1; Commission Decision COMP/M.1684 – *Carrefour/Promodes*, [2000].

⁶³ Communication from the Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1, para 197-199.

⁶⁴ See the concern for competitive effects upstream and downstream market power in the case of exclusive supply in Guidelines on Vertical Restraints [2010] OJ C 130/1, para 194. See also the dualistic approach concerning relevant market for calculating the 30 % market share threshold under the Block Exemption Regulation in the Guidelines on Vertical Restraints [2010] OJ C 130/1 para 87 to 95. See also: Jochen Ehlers, ‘Vertical Restraints’ in Günter Hirsch, Franz Montag and Franz Jürgen Säcker (eds), *Competition Law: European Community Practice and Procedure* (Thomson - Sweet & Maxwell 2008) para 2.3.073.

and the selling market.⁶⁵ According to the Commission the definition of the relevant purchasing market is mandatory to assess the competitive effects in the upstream market power by following the principles described in the Notice on Market Definition and adopting the Buyer's SSNIP test that is discussed below. It states that in addition to this market definition "if parties are (...) competitors on one or more selling markets, those markets are also relevant for the assessment" and their definition ought to be made in accordance to the traditional methodologies, as put forward by the proposal of the dualistic approach.⁶⁶ This partial approach by the Commission is, timid, to say the least. In accordance to it, downstream market definition shall be only made whenever parties are competitors and it is not needed in the other circumstances. Anticompetitive harm by buyers may have an impact for downstream consumers even if parties are not direct competitors on the downstream market, particularly in the medium to long term. Indeed it is sensible to think that if parties to a purchasing agreement are also competitors the anticompetitive risks are increased because of a risk of coordination in the downstream market. However, in my view the dual approach ought to be done even if parties are not direct competitors to take into account the related market structures. Therefore, the Guidelines on Horizontal Agreements provide some partial and limited an improvement to the approach to buyer power market definition but it is insufficient, casuistic and not a general statement for all types of buyer power cases as it would be advisable for it to happen.

1.3.1. Justification of the dualistic approach

The adoption of the dualistic approach in EU Competition Law is justified by economic and legal grounds that I discuss in the following paragraphs. From a legal perspective, the dualistic approach has been imprimatured by the case law, in particular as confirmed by the GC in *British Airways v Commission*,⁶⁷ the Merger Control Regulation⁶⁸, the Commission's practice,⁶⁹ and also by the Commission in its Guidelines and policy instruments, documents that have a strong authoritative value as a secondary source of the law. Additionally, a dual market definition is in line with ordoliberal theory and the objective of protecting the competition as such and the

⁶⁵ Communication from the Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1, para 197.

⁶⁶ Communication from the Commission Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1, para 199.

⁶⁷ T-219/99 - *British Airways v Commission*, EU:T:2003:343 E.C.R. [2003] II-05917, para 217. See also supporting this interpretation of the Judgment Rose and Bailey para 4.064

⁶⁸ Council Regulation (EC) 139/2004 on the Control of Concentrations between Undertakings [2004] L 24/1, art. 2.1.(a).(b).

⁶⁹ Commission Decision IV/M.1221 — *Rewe/Meinl* [1999] OJ L274/1, para 76. See the opinion of Ezrachi and Ioannidou who argue that in this case the Commission "required the Commission to adjust its analysis of the relevant markets as the transaction on the buyer side affected both the downstream retail market as well as the upstream procurement market" in Ariel Ezrachi and Maira Ioannidou, 'Buyer Power in European Union Merger Control' 10 *European Competition Journal* [2014].

competitive market structure as recognized by the ECJ in *GlaxoSmithKline Services and Others v Commission and Others*.⁷⁰ These concerns and aims are in line with a compromised consumer welfare appear as discussed in another paper by the author⁷¹ and ordoliberal theory are quite present in buyer power cases as noted by Ezrachi and Ioannidou.⁷² Also, the GC has also tacitly recognized the need for a dualistic approach to buyer power cases in *British Airways v Commission* when expressing that “competition law concentrates upon protecting the market structure from artificial distortions because by doing so the interests of the consumer in the medium to long term are best protected”.⁷³ It does so by concerning about competitive effects in all the markets in which the buying undertaking carries out its economic activity.

Furthermore, the dualistic approach to buyer power is analogue to other multimarket definitions carried out in EU competition law as recognized explicitly *Tetra Pak v Commission*,⁷⁴ the dual measurement of the market share for the application of Art. 3 of the Block Exemption Regulation in the upstream and downstream market,⁷⁵ and common in cases dealing with tying and bundling⁷⁶ and aftermarkets.⁷⁷ When assessing these practices the Commission defines both the tying and the tied relevant markets as necessary pre-requisite.⁷⁸

From an economic perspective, the incentives and economics of buying markets are different from selling side markets. In buying markets is the purchaser the one that has the lead and makes

⁷⁰ “Secondly, it must be borne in mind that the Court has held that, like other competition rules laid down in the Treaty, Article 81 EC aims to protect not only the interests of competitors or of consumers, but also the structure of the market and, in so doing, competition as such”, C-501/06 P - *GlaxoSmithKline Services and Others v Commission and Others*, EU:C:2009:610 E.C.R. [2009] I-09291, para. 63.

⁷¹ Herrera Anchustegui available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2579308.

⁷² Ezrachi and Ioannidou [2014] 73

⁷³ T-219/99 - *British Airways v Commission*, EU:T:2003:343 E.C.R. [2003] II-05917, para 264; see also C-6/72 - *Europemballage Corporation and Continental Can Company v Commission*, EU:C:1973:22 E.C.R. [1973] 00215, para 26. See also and more recently

⁷⁴ “Analysis of the markets in the milk-packaging sector thus shows that the four markets concerned, defined in the Decision, were indeed separate markets.”, T-83/91 - *Tetra Pak v Commission*, EU:T:1994:246 E.C.R. [1994] II-00755, para 73.

⁷⁵ Art. 3, Commission Regulation (EU) No 330/2010 on the application of Article 101(3) of the Treaty on the Functioning of the European Union to categories of vertical agreements and concerted practices [2010] OJ L102/1; Guidelines on Vertical Restraints [2010] OJ C 130/1 para 88.

⁷⁶ See for example: T-30/89 - *Hilti v Commission*, EU:T:1991:70 E.C.R. [1991] II-01439, where the GC found the existence of three product markets; T-201/04 - *Microsoft v Commission*, EU:T:2007:289 E.C.R. [2007] II-03601, para 912-944, where the GC concluded that operating system software and media players are separate products in different markets.

⁷⁷ C-22/78 - *Hugin v Commission*, EU:C:1979:138 E.C.R. [1979] 01869, where the ECJ found the existence of separate markets for cash register machines, repair services and aftermarkets for spare parts; T-427/08 - *CEAHR v Commission*, EU:T:2010:517 E.C.R. [2010] II-05865, where the GC decided whether the manufacture and repair and maintenance service for luxury watches are separate markets and annulled the Commission Decision based on its erroneous finding on a sole market; and C-333/94 P - *Tetra Pak v Commission*, EU:C:1996:436 E.C.R. [1996] I-05951, where it was discussed whether machinery for packing and carton were related products.

⁷⁸ Ian Rose and Cynthia Ngwe, ‘The Ordoliberal Tradition in the European Union, Its Influence on Article 82 EC and the IBA's Comments on the Article 82 EC Discussion Paper’ 3 *Competition Law International* [2007]

the key decisions as well as being different in respect with the fact that the buyer does not make a direct profit from acquiring goods whereas a seller does when selling a good.⁷⁹ Also, a dualistic approach is in line with the “more economic approach” that has underpinned competition law thinking since the last decade of the 90s as it fully takes into consideration the theories of harm concerning buyer power effects.⁸⁰ Buyer power effects have implications in the upstream market but they also affect the downstream market competitiveness and ultimately the end consumer,⁸¹ particularly but not only if the undertaking possesses substantive downstream market power fitting the “hourglass shape”. This is due to the fact that demand in the upstream purchasing market is usually a derived demand from the demand for the final product.⁸² The dualistic approach allows for these economic differences to be distinguished. By defining the upstream and downstream markets the buyer power welfare effects vis-à-vis consumers and suppliers are properly identified. Furthermore, the proposed approach suggests inquiring whether the concerned undertaking has market power in both the upstream and downstream markets as the welfare implications of a dominant position in both markets is rather different from just enjoying market power upstream.

1.4. The relevant purchasing market

In this section I discuss the current approaches to defining the relevant purchasing market by analyzing the most relevant aspects contemplated in the different Commission’s guidelines and other authoritative sources, as well as stressing the methodologies’ shortcomings. With respect to the downstream market analysis, its definition in buyer power cases ought to be carried out following the standard methodology as this is perfectly compatible with the dualistic approach here proposed. Additionally, this analysis is made from a general perspective covering agreement, dominance and merger cases, unless explicitly remarket. I focus the discussion on the product market definition dimension and do not deal *in extenso* with the geographic market

⁷⁹ Carstensen, ‘Buyer Power and the Horizontal Merger Guidelines: Minor Progress on an Important Issue’ [2012] 791

⁸⁰ Neelie Kroes, ‘The European Commission's enforcement priorities as regards exclusionary abuses of dominance - current thinking’ 4 Competition Law International [2008]

⁸¹ Zhiqi Chen, ‘Buyer power: Economic theory and antitrust policy’ 22 Research in Law and Economics [2007]; Making a similar remark in the case of buyer cartels see: Carstensen, ‘Buyer Cartels Versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy’ [2010] 11. Also stressing this point for markets in the vertical chain see: Niels, Jenkins and Kavanagh, 92 In a US Antitrust perspective, it has been held that in the case of input markets courts have explicitly considered the impact of downstream products in defining the upstream input market, see: American Bar Association, 50; *Brookins v Int’l Motors Contest Ass’n*, 219 F.3d 849, 853-854 (8th Cir. 2000).

⁸² American Bar Association, 51; Niels, Jenkins and Kavanagh, 92.

dimension as the methodology is not particularly relevant nor modified by my proposal of a dualistic approach and can follow the standard treatment given in seller-side cases.⁸³

1.4.1. Conceptualizing the relevant market

Defining the relevant market aims at identifying which products or services (product market) are close substitutes for one another within a geographical area in which conditions of competition are sufficiently homogenous (geographic market) that they operate as a competitive constraint on the behavior of suppliers and/or *buyers* of those goods.⁸⁴ It acts as a framework upon which the rest of the investigation will be carried out. Because of being a conceptual framework its determination can be done for either monopsony cases or bargaining cases following a similar approach. Also, it allows identifying the suppliers and customers/consumers active on that market. Based on these findings market size and market share can be calculated thanks to their sales/purchases of the relevant products in the relevant area.⁸⁵ As such, the relevant market allows for the later assessment of the undertaking(s)'s market power.⁸⁶

The relevant market is usually defined by applying the hypothetical monopolist test – also known as the SSNIP test⁸⁷ as the preferred but not exclusive approach, which measures demand substitutability.⁸⁸ To a lesser extent, supply substitutability is also taken into account at this stage when it is timely and effective.⁸⁹ The test answers whether a market is a collection of specific goods in a particular geographic location such that a single undertaking would be able to increase prices profitably for a considerable period of time.⁹⁰ As such, a relevant market is something worth of monopolizing because the monopolization allows for a price increase to be profitable.⁹¹ This assessment does not determine if the undertaking(s) under investigation have significant market power, is dominant or whether a concentration could significantly impede effective

⁸³ For a general and discussion of geographic market definition see, inter alia: Oinonen, 264 to 288; Richard A. Posner and William M. Landes, 'Market Power in Antitrust Case' 94 Harvard Law Review [1980].

⁸⁴ Niels, Jenkins and Kavanagh, 29; Jones and Sufrin, 63; Motta, 102.

⁸⁵ Commission Notice on the Definition of the Relevant Market for the Purposes of the Community Competition Law [1997] OJ C372/5, para 53; Simon Bishop and Mike Walker, *The economics of EC competition law: concepts, application and measurement* (Sweet & Maxwell 2010) 109.

⁸⁶ Faull and Nikpay, para 1.144; Oinonen, 296.

⁸⁷ These terms are used interchangeably in the literature. Originally, the SSNIP test was developed by the US Antitrust Experience and "imported" to EU Competition Law thereafter. The SSNIP was firstly introduced in EU competition law by the Commission Decision relating to a proceeding under Council Regulation (IV/M 190 Nestlé/Perrier [1992] OJ L 356/1, which also deals with buyer power issues.

⁸⁸ Crocioni [2002] 354; Niels, Jenkins and Kavanagh, 38; Säcker, 15 to 28 and 63 to 65.

⁸⁹ Commission Notice on the Definition of the Relevant Market for the Purposes of the Community Competition Law [1997] OJ C372/5, para 20-21

⁹⁰ Bishop and Walker, 11; OECD, 'Policy Roundtables: Market Definition' [2012] 11; Motta, 102 to 103.

⁹¹ Bishop and Walker, 112.

competition; this is left to market power assessment, which shall be discussed *infra* in Section 1.4.

Several alternatives for a proper buyer oriented market definition have been proposed in the literature. The majority of them have in common the adoption of a “hypothetical monopsonist test” - *the Buyer’s SSNIP test* -, a modified version of the standard assessment. This implies that the analysis adopts the seller’s point of view and asks what the competing uses for its output are, and which other channels or buyers will acquire its output instead of asking what products are substitutable for consumers.⁹² As such, the emphasis is placed on whether suppliers have alternative distribution channels for their output or whether they face an inelastic supply curve. The following paragraphs discuss the different proposals incorporated in authoritative sources.

1.4.2. The Commission’s view on Buying Market Definition

The methodology for defining the relevant market, including the Buyer’s SNNIP test, has been incorporated in EU competition policy by means of Commission’s Guidelines in the form of authoritative secondary sources. In 1997 the Commission published a Commission Notice on the definition of the relevant market for the purposes of the Community competition law (“Notice on Market Definition”).⁹³ Because of its importance in the practice of EU competition law - its acknowledgement by the GC (but not the ECJ) -,⁹⁴ and its considerations concerning the definition of relevant purchasing markets the remainder of this section discusses *in extenso* the content of this instrument.

The Notice on Market Definition is applicable, with certain nuances, to agreements, dominance and concentration cases.⁹⁵ From a conceptual perspective, it draws inspiration from the ideas developed by the case law and US Antitrust experience,⁹⁶ and provides a “modernized” and more

⁹² Blair and Harrison, 62; Bundeskartellamt 5.

⁹³ Commission Notice on the Definition of the Relevant Market for the Purposes of the Community Competition Law [1997] OJ C372/5.

⁹⁴ “In order to evaluate the merits of the applicants’ arguments, both in principle and in the specific circumstances of this case, it is necessary to place them in the theoretical framework adopted by the Commission in the Notice on market definition for the purposes of determining competitive constraints”, T-321/05 - *AstraZeneca v Commission*, EU:T:2010:266 E.C.R. [2010] II-02805, para 86; see also: T-427/08 - *CEAHR v Commission*, EU:T:2010:517 E.C.R. [2010] II-05865, para 68-70; T-336/07 - *Telefónica and Telefónica de España v Commission*, EU:T:2012:172, para 113; T-201/04 - *Microsoft v Commission*, EU:T:2007:289 E.C.R. [2007] II-03601, para 484; T-301/04 - *Clearstream v Commission*, EU:T:2009:317 E.C.R. [2009] II-03155, para 50.

⁹⁵ See para 10 of the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, which refer to the Notice on Market Definition for guidance in the assessment of the competitive constraints faced by the merging entity. Also of this opinion are: C. J. Cook and C. S. Kerse, *EC merger control* (Sweet & Maxwell 2009) 218; Jones and Sufrin, 66.

⁹⁶ The SSNIP test was firstly incorporated in the US 1982 Merger Guidelines as “the market definition used by the Department can be stated formally as follows: ‘a market consists of a group of products and an associated geographic area such that (an the absence of new entry) a hypothetical, unregulated firm that made all the sales of those products

economic approach to determining the relevant market.⁹⁷ The Notice on Market Definition adopts the hypothetical monopolist test as the main methodology for defining the relevant market. It attempts clarifying the methodology adopted by the Commission on the determination of the relevant market in the enforcement of EU competition law. For buyer power cases the Notice on Market Definition suggest adopting a reverse of the seller-side test (the buyer's SSNIP) and does not distinguish whether this apply to monopsony or bargaining power cases.

Structurally, the Notice on Market Definition is a general document providing guidance for all types of competition cases, including buyer power ones. Despite its longevity, the Notice on Market Definition has not been replaced. Its content has been partially updated by more specific and area-centered Commission communications.⁹⁸ Two of these instruments have particular importance for buyer's market definition cases. The EU Horizontal Merger Guidelines make explicit reference to the Notice on Market Definition as the instrument providing guidance when defining the relevant market.⁹⁹ In the case of agreements between purchasing undertakings, the Guidelines on Horizontal Agreements provides an updated and detailed account on the methodology defining relevant purchasing markets when assessing purchasing agreements.¹⁰⁰ These instruments largely follow the principles described in the Notice on Market Definition but provide an update and quite some detail on how to define relevant purchasing markets.¹⁰¹

The Notice on Market Definition firstly divides the relevant market determination on a product and geographic dimension. Then, when assessing each of these sub-markets it considers two types of competitive constraints for determining the relevant market. These are demand substitution, and supply substitution.¹⁰² The following subsections analyze these constraints from a buyer power perspective.

in that area could increase its profits through a small but significant and non-transitory increase in price (above prevailing or likely future levels).” U.S. Department of Justice Merger Guidelines [1982] , footnote 6, available at: <http://www.justice.gov/atr/hmerger/11248.htm>. Also highlighting the influence of US Antitrust experience and the approach “taken by antitrust authorities in the US” see: Jones and Sufrin, 68; Whish and Bailey, 27.

⁹⁷ Jones and Sufrin, 63.

⁹⁸ Guidelines on the application of Article 101 of the Treaty on the Functioning of the European Union to technology transfer agreements [2014] OJ C89/3, para 19-40; Guidelines on Vertical Restraints [2010] OJ C 130/1, para 86-95; Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C 11/1, para 112-126, 155-156, 197-199, 229, 261-262.

⁹⁹ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, para 10.

¹⁰⁰ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C 11/1, para 194-199.

¹⁰¹ Van Bael and Bellis, 164 to 147.

¹⁰² Potential competition, the third competitive constraint indicated by the Notice on Market Definition is generally not taken into account at this stage of the process of market definition but rather later on when the market power assessment is made. See: Commission Notice on the Definition of the Relevant Market for the Purposes of the Community Competition Law [1997] OJ C372/5, para 14; Bishop and Walker, 118

Demand substitution: Buyer's SSNIP test

Demand substitution constitutes the most immediate and effective disciplinary constraint on the buyer or seller of a good, in particular to their pricing decision, as acknowledged by the GC in *Telefónica and Telefónica de España v Commission*.¹⁰³ Demand substitution determines which currently available products the opposite market side deems as interchangeable to satisfy a need.¹⁰⁴ For example, whether limes competes with lemons in the market for citrus fruits. Demand substitution is the starting point for defining the relevant product market and it is arguably the most important constraint faced by an undertaking.¹⁰⁵

In a buyer power case I propose that the “reverse demand substitution” describes the ability of suppliers to switch from a buyer to another as a response to a decrease in the relative purchasing price for their outputs.¹⁰⁶ These same factors were identified by the Commission in *Rewe/Meinl* when it stated that: “The position is different, however, when it comes to defining procurement markets. Here, the critical factors are the producers’ flexibility in changing output and the alternative outlets open to them.”¹⁰⁷ In contrast to seller side demand substitution the “reverse demand substitution” does not determine which other buyers compete for the input. This is so because the buyers might not necessarily be competitors as they might use the input they acquire for very different outputs.¹⁰⁸ Consequently, reverse demand substitution defines which other buyers currently compete with the undertaking under investigation.¹⁰⁹ In other words, if buyers are plentiful and suppliers have other distribution channels to resort to, they are in no compulsion to surrender to buyer power.¹¹⁰ For example: in a market for the purchase of beef meat reverse demand substitution represents all the different sale channels a buyer has to offer its goods: these could be food retailers (supermarkets), restaurants, hotels or even direct end consumers. These alternative buyers might not be among each other direct competitors in the downstream market.

From a legal perspective, the concept of reverse demand substitution has been incorporated into the Guidelines on Horizontal Agreements when stating that “the suppliers’ alternatives are

¹⁰³ T-336/07 - *Telefónica and Telefónica de España v Commission*, EU:T:2012:172, para 113; See also: Commission Notice on the Definition of the Relevant Market for the Purposes of the Community Competition Law [1997] OJ C372/5, para 13. For an economic discussion on demand substitution see: Niels, Jenkins and Kavanagh, 31 to 37; Bishop and Walker, 118 to 119.

¹⁰⁴ Säcker, 30; Baker [2007] 132.

¹⁰⁵ Van Bael and Bellis, 135.

¹⁰⁶ Ritter and Braun, 395

¹⁰⁷ Commission Decision IV/M.1221 — *Rewe/Meinl* [1999] OJ L274/1, para 76.

¹⁰⁸ Carstensen, ‘Buyer Power and the Horizontal Merger Guidelines: Minor Progress on an Important Issue’ [2012] 810

¹⁰⁹ Van Bael and Bellis, 146; Cosmo Graham, *EU and UK Competition Law* (Pearson Education Limited 2010) 25.

¹¹⁰ John Kenneth Galbraith, *The Affluent Society & Other Writings 1952-1967: American Capitalism; The Great Crash, 1929; The Affluent Society; The New Industrial State*. (The Library of America 2010) 116; stressing the importance of alternative purchasers in buyer power cases, see: Ritter and Braun, 35.

decisive in identifying the competitive constraints on purchasers”.¹¹¹ Substitutability exists according to the ECJ in *Hoffmann-La Roche v Commission* when “there is a sufficient degree of interchangeability between all the products forming part of the same market in so far as a specific use of such products is concerned”.¹¹² Moreover, the substitutability ought to be assessed from a consumer’s perspective as settled by the EU in *United Brands v Commission*¹¹³ as well as by the Commission in the Notice on Market Definition.¹¹⁴ In a buyer power case that substitutability ought to be defined *from a supplier’s perspective* and will determine not what products are substitutes but instead what distribution channels are substitutes among each other.¹¹⁵

The Notice on Market Definition and the Commission’s practice reveal that the main factors assessed when determining demand substitution are product characteristics and its intended use and price.¹¹⁶ The finding that two products (or distribution channels) share similar characteristic or are intended for a similar use is not a necessary condition for the products (or distribution channels) to be considered as demand substitutes as clarified by the Notice on Market

¹¹¹ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1, para 198.

¹¹² C-85/76 - *Hoffmann-La Roche v Commission*, EU:C:1979:36 E.C.R. [1979] 00461, para 28 in fine; the same wording has been ratified recently by the GC and the ECJ in several occasions. See also: T-427/08 - *CEAHR v Commission*, EU:T:2010:517 E.C.R. [2010] II-05865, para 67.

¹¹³ C-27/76 - *United Brands v Commission*, EU:C:1978:22 E.C.R. [1978] 00207, para 12-35, wherein the ECJ decided that from the consumer’s point of view bananas constitute a significantly different product market from other fruits.

¹¹⁴ “A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable **by the consumer**, by reason of the products’ characteristics, their prices and their intended use”, Commission Notice on the Definition of the Relevant Market for the Purposes of the Community Competition Law [1997] OJ C372/5, para 7, (emphasis added), and recently ratified by the GC in T-336/07 - *Telefónica and Telefónica de España v Commission*, EU:T:2012:172, para 113; and T-446/05 - *Amann & Söhne and Cousin Filterie v Commission*, EU:T:2010:165 E.C.R. [2010] II-01255, para 59. See also: Lawrence Wu and Simon Baker, ‘Applying the market definition guidelines of the European Commission’ 19 *European Competition Law Review* [1998]; Fuller in Hirsch, Montag and Säcker, 438 to 439. For common mistakes defining which products are substitutes among each other see: Niels, Jenkins and Kavanagh, 27 to 29.

¹¹⁵ Commission Notice on the Definition of the Relevant Market for the Purposes of the Community Competition Law [1997] OJ C372/5, para 17 (in fine); Carstensen, ‘Buyer Power and the Horizontal Merger Guidelines: Minor Progress on an Important Issue’ [2012] 782.

¹¹⁶ “An analysis of the product characteristics and its intended use allows the Commission, as a first step, to limit the field of investigation of possible substitutes.”, Commission Notice on the Definition of the Relevant Market for the Purposes of the Community Competition Law [1997] OJ C372/5, para 36. See also: Van Bael and Bellis, 136 to 138; Oinonen, 244; Cf with the opinion of Ten Kate and Niels who suggest that demand substitution must take into account three factors: internal substitution, external substitution and demand reduction. Following this proposal and adapting it to a buyer power scenario, internal substitution measures the ease with which suppliers of products within the relevant market changes to other buyers in the same product market due to a decrease in the purchasing price. External substitution would measure the ease with which suppliers will switch to the production of another product due to the decrease in purchasing price. Lastly, supply reduction will measure the degree to which suppliers stop producing the product that suffered the decrease in purchasing price without switching its production to another good or service in Kate and Niels [2009] 312 to 313.

Definition.¹¹⁷ Whether the products satisfy consumer's needs will be determined by deciding if they are substitutes from a consumer's (or supplier's) perspective.¹¹⁸ For example if the supplier has been required to meet a specific need for a buyer or a technical specification precluding it to sell the output to other buyers with other needs.¹¹⁹ Price – prevailing or but for -, on the other hand is relevant as it allows for the application of the SSNIP test.

To assess reverse demand substitution the Notice on Market Definition employs the SSNIP test,¹²⁰ which is mostly demand-side oriented.¹²¹ For buyer power cases, however, it suggests the application of the *Buyer's SSNIP* test to measure the reverse demand substitution.¹²² The Notice on Market Definition expressly states that:

“(t)he equivalent analysis (SSNIP test) is applicable in cases concerning the concentration (sic) of **buying power**, where the **starting point would then be the supplier and the price test serves to identify the alternative distribution channel** or outlets for the supplier's product. In the application of these principles, careful account should be taken of certain particular situations as described within paragraphs 56 or 58”.¹²³

Paragraph 17 of the Notice on Market Definition suggests applying the Buyer's SSNIP test by taking the supplier's point of view. Then it decreases in a small and non-transitory manner the purchasing price to test whether there are alternative distribution channels or outlets that would

¹¹⁷ Commission Notice on the Definition of the Relevant Market for the Purposes of the Community Competition Law [1997] OJ C372/5, para 36.

¹¹⁸ This was the case for the comparison between tampons and sanitary towels, which were deemed not substitutes despite having the same purpose, in Commission Decision IV/M.430 — Procter & Gamble/VP Schickedanz (II) [1994] OJ L354/32, para 42.

¹¹⁹ Ritter and Braun, 35.

¹²⁰ SSNIP stands for “small but significant and non-transitory increase in price”. The SSNIP test was introduced in 1982 in the US with the Horizontal Merger Guidelines. The SSNIP test remains in force in the last version of the US Horizontal Merger Guidelines [2010], pg. 8-13. In the EU the test developed by the Commission is slightly different: “a hypothetical small (in the range of 5% to 10%) but permanent relative price increase in the products and areas being considered”, Commission Notice on the Definition of the Relevant Market for the Purposes of the Community Competition Law [1997] OJ C372/5, para 17. See also the OECD report on the differences between the test in: OECD, ‘Policy Roundtables: Market Definition’ [2012] 30 to 31.

¹²¹ “The discussion above (referring to the general discussion on market definition) is predicated on markets defined on the supply side. However, it is also possible to define markets on the demand side, that is, in terms of what is being bought”, Jones and Sufrin, 81.

¹²² The Buyer's SSNIP test is a name adopted by the author as it clearly defines what the methodology is. Other authors have adopted a different denomination, for example Kokkoris that adopts the SSNDP (Small but Significant Non-Transitory Decrease in Prices) in Kokkoris [2006] and Ioannis. Kokkoris and Leanne Day, ‘Buyer power in UK merger control’ 30 European Competition Law Review [2009], which is in turn based on the previous work by Paul Dobson and others, ‘Buyer power and its impact on competition in the food retail distribution sector of the European Union’ European Commission under study contract NoIV/98/ETD/078 [2000].

¹²³ Commission Notice on the Definition of the Relevant Market for the Purposes of the Community Competition Law [1997] OJ C372/5, para 17 (in fine).

acquire the supplier's goods.¹²⁴ By doing so, the key factor is reverse demand substitution.¹²⁵ A similar approach is taken by the Guidelines on Horizontal Agreements which suggest measuring demand substitution by examining the suppliers' reaction to a small but non-transitory – in opposition to permanent –,¹²⁶ as one of the (several) methodologies for purchasing market definition, leaving room but not expressly mentioning other alternatives for direct assessment, such as the Buyer Power Index discussed further in this chapter.

In practice the Buyer's SSNIP will ask whether after a non-transitory decrease in the range of five to ten percent purchasing prices sellers are able to switch to other buyers and make the decrease in price non-profitable for the buyer.¹²⁷ It will not be profitable if suppliers are able to find alternative buyers or switch production to another good or service.¹²⁸ If buyer's substitution were enough to make the price decrease unprofitable, then additional buyers and areas are included in the relevant market and submitted to the same decrease in purchasing price.¹²⁹ This addition would be continued until the set of buyers and geographic area is such that a small, non-transitory decrease in relative prices would be profitable for a hypothetical monopsonist.¹³⁰

Importantly, under the Buyer's SSNIP test the relevant market might be composed by buyers belonging to different downstream markets as the input acquired can have different uses.¹³¹ Or, as Chen points out, relevant upstream markets are not necessarily aligned with the relevant downstream markets as they can be quite different in the terms of products included.¹³² For

¹²⁴ Commission Notice on the Definition of the Relevant Market for the Purposes of the Community Competition Law [1997] OJ C372/5, para 17.

¹²⁵ Commission Notice on the Definition of the Relevant Market for the Purposes of the Community Competition Law [1997] OJ C372/5, para 17. A similar point is made by Blair and Harrison when stating that "(i)f buyers respond quickly to the efforts of another buyer to depress prices by increasing purchases when prices fall, they must be included as part of the defendant's market", Blair and Harrison, 63. Also in the same line is the methodology proposed by Kokkoris of the SSNDP test which assesses "whether suppliers would refuse to supply a buyer in the presence of a permanent five to ten percent reduction in the price the buyer would pay for the suppliers' products, so as the price reduction to be unprofitable for the buyer", in Kokkoris [2006] 147. See also the proposal by Chen when describing the hypothetical monopsonist test as "A relevant market is defined as the smallest group of products and the smallest geographic area in which a sole profit-maximizing buyer (a "hypothetical monopsonist") would impose and sustain a significant and non-transitory price decrease below its normal level" and focusing on the ability of the seller to find alternative buyers in Chen [2007] 29.

¹²⁶ The wording employed by the Commission in the Notice on Market Definition speaks of "permanent" and "lasting change". Contrast with the wording use in the Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1, para 198. Non-transitory is understood as a period of usually one or two years whereas permanent is understood as a long term price variation. See: G. Niels, H. Jenkins and J. Kavanagh, *Economics for competition lawyers*, (Oxford 2011), pg. 45-46.

¹²⁷ Commission Notice on the Definition of the Relevant Market for the Purposes of the Community Competition Law [1997] OJ C372/5, para 17.

¹²⁸ Van Bael and Bellis, 146.

¹²⁹ Similarly, but from a seller's perspective: Kate and Niels [2009] 301; Crocioni [2002] 355.

¹³⁰ Commission Notice on the Definition of the Relevant Market for the Purposes of the Community Competition Law [1997] OJ C372/5, para 17. For a similar explanation see: Kokkoris [2006] 148; Graham, 26.

¹³¹ Canadian contribution in OECD, *Policy Roundtables: Monopsony and Buyer Power* 143.

¹³² Chen [2007] 30.

example, the product market for the purchase of fresh oranges might include supermarkets and ice cream producers, which may imply that they are not direct competitors downstream. Also, it must be taken into account that, traditionally and for most markets, there are usually many more buyers than suppliers of a good or service – also related to the fact that the good or service may have many different users – and, therefore, the pure number of alternative buyers must be evaluated with this in mind. In other words, the product market ought not to focus on any specific downstream use.¹³³ These aspects must be kept in mind as it will make the market in occasions larger than what it is. The Notice on Market Definition, however, does not take into account this situation.

As a general rule the price to take into account will be the *prevailing market price*, in particular for concentration cases. In cases regarding dominance this should not be taken for granted as the current prevailing price might have been determined in the absence of effective competition (cellophane fallacy).¹³⁴ Instead, it should determine what would have been the competitive price in the dominance case, which is a very difficult exercise. The Notice on Market Definition seems to consider the prevailing price as the competitive price but by doing so it appears to overlook the “reverse cellophane fallacy” problem. The reverse cellophane fallacy claims that if the prevailing price is taken into account by using estimated demand elasticities, instead of making the market too broad, the problem is that market definition becomes too narrow and “the potential for the exercise of market power is likely to be overstated”.¹³⁵ This occurs, for example, if the prevailing price is too low making other goods (or distribution channels) appear to be weaker substitutes when they are really not.¹³⁶ The reverse cellophane fallacy may be present in buyer power markets and may lead to the erroneous conclusion that a buyer that pays a low price has substantive market power when in reality it is not.

Lastly, the Notice on Market Definition remarks that particular attention is to be paid to two situations when determining demand substitution, namely: secondary markets and chains of substitution.¹³⁷ The examples given by the Notice on Market Definition are not related to buyer

¹³³ See also the opinion of Carstensen when referring to substitutability from an input perspective in Carstensen, ‘Buyer Cartels Versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy’ [2010] 19.

¹³⁴ Commission Notice on the Definition of the Relevant Market for the Purposes of the Community Competition Law [1997] OJ C372/5, para 19. Discussing the cellophane fallacy in some detail see: George A. Hay, ‘Market Power in Antitrust’ 60 Antitrust Law Journal [1991-1992].

¹³⁵ Luke M. Froeb and Gregory J. Werden, ‘The Reverse Cellophane Fallacy in Market Delineation’ 7 Review of Industrial Organization [1992]. Discussing the reverse cellophane fallacy in regulated markets see: Debra J. Aron and David E. Burnstein, ‘Regulatory Policy and the Reverse Cellophane Fallacy’ 6 Journal of Competition Law and Economics [2010]; see also: Jerry A. Hausman and J. Gregory Sidak, ‘A Consumer-Welfare Approach to the Mandatory Unbundling of Telecommunications Networks’ 109 The Yale Law Journal [1999].

¹³⁶ Aron and Burnstein [2010] 975 to 976.

¹³⁷ Commission Notice on the Definition of the Relevant Market for the Purposes of the Community Competition Law [1997] OJ C372/5, para 17 and 56-58. For an economic discussion of aftermarkets, see: Niels, Jenkins and Kavanagh, 87 to 89.

power cases but that does not imply that these effects cannot occur in buyer power scenarios. Secondary markets –or aftermarket-, not to be confused with two-sided markets,¹³⁸ present the dilemma of determining whether the main product and its spare parts or consumables are part of the same market or constitute different markets.¹³⁹ Examples are spare parts for vehicles and electronic games. Secondary markets deserve special analysis as the assessment must take into account the “constraints on substitution imposed by conditions in the connected markets”, such as for example compatibility issues. In a buyer power case an example of a secondary purchasing market would be when a large buyer acquires very specialized industrial machinery with a long life span from a provider at a competitive price. The supplier, rather small in comparison to the buyer, commits its total production capacity to satisfy the demand of machinery spare parts for the large buyer –having then a very inelastic supply curve-. The large buyer exerts its power on the spare parts market by paying a purchasing price below competitive levels. If the market is broadly defined in the primary market the buying undertaking will arguably have much less buyer power than when compared to a narrow definition in which the secondary market for spare parts is the main focus.

Chains of substitution are problematic as they might lead to the definition of a relevant market where the product or geographic areas at the market extreme are not substitutes among themselves.¹⁴⁰ The example provided defines the geographic market when transport costs are a significant issue as the pricing of the goods might be constrained by the chain substitution effect leading to a definition of a different market.¹⁴¹

Supply substitution – buyer substitution

Supply substitution is the second competitive constraint assessed when determining the relevant market according to the Notice on Market Definition and the ECJ’s case law, particularly in

¹³⁸ Two-sided markets, nevertheless are important for buyer power cases, in particular regarding buyer power in public procurement regulated markets in the case of central purchasing bodies, as pointed out by Sánchez Graells in Albert Sánchez Graells, *Public procurement and the EU competition rules* (Hart 2011) 54 to 55. A two-sided market is when two distinct groups of customers have inter-related demand and the groups impose among them positive externalities. One example of a two-sided market are newspapers which sell advertisement spaces and information. Another example is credit cards connecting retailers and consumers as discussed in T-491/07 - CB v Commission, EU:T:2012:633 [2012] published in the electronic report of cases and appealed before the ECJ C-67/13 P - *CB v Commission*, EU:C:2014:2204 [2014] not yet published in the Court Reports. For a description of the basic economics of two-sided markets see, *inter alia*, Bishop and Walker, 93 to 96; Carlton [2007] 25 to 26; OECD, ‘Policy Roundtables: Market Definition’ [2012] 54 to 57; Niels, Jenkins and Kavanagh, 89; American Bar Association, 437 to 469.

¹³⁹ Van Bael and Bellis, 148 to 149.

¹⁴⁰ Commission Notice on the Definition of the Relevant Market for the Purposes of the Community Competition Law [1997] OJ C372/5, para 57.

¹⁴¹ Kokkoris [2006] 146.

*Continental Can*¹⁴² and *Michelin I*.¹⁴³ It is defined as the capacity of other suppliers (or buyers) to switch to the production (or procurement) of the monopolized good in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices.¹⁴⁴ Unlike demand substitution, supply substitution is future oriented.¹⁴⁵ When assessing it two factors should be taken into account to avoid the market definition to become too narrow or too broad, as noted by Oinonen.¹⁴⁶ If the evaluating body does not take into account supply substitutability the market definition may become too narrow as potential sources of competitive constraint are disregarded. On the other hand, if too much emphasis is placed on supply substitution the market definition may become too broad as, depending on the market, many undertakings could start switching their production. This latter concern has particular importance in buyer power cases as traditionally there are more buyers than sellers in a given market as discussed above, and a non-traditional buyer of a good may desire to acquire it seen the reduction in the input's purchasing price. These inherent problems of supply substitution have led to some critical voices concerning its appropriateness when performing the market definition. Baker, in the sphere of US Antitrust, argues that supply substitution should not be taken into account at the stage of market definition but later because "it can be both difficult and confusing to ask one analytical step, market definition, to account for two economic forces, demand and supply substitution."¹⁴⁷ In EU competition law the Commission's practice and the Notice on Market definition leave little doubt on whether supply substitutability to be employed in the market definition phase.¹⁴⁸ In addition, there are some practical reasons on why this ought to be done, as argued by Motta, "there is no reason to delay the moment at which substitutes on the supply side are considered. Immediate consideration of the existing competitive constraints will save time and help the investigation."¹⁴⁹

To minimize these risks the Notice on Market Definition and the EU judiciary takes into account *buyer substitution* at the relevant market stage when the switching effects are "equivalent to those

¹⁴² C-6/72 - *Europemballage Corporation and Continental Can Company v Commission*, EU:C:1973:22 E.C.R. [1973] 00215, para 33 and ss, where the ECJ consider that potential competitors were able to switch their facilities to the production of cans to determine a market for light metal packaging.

¹⁴³ "(...) an examination limited to the objective characteristics only of the relevant products cannot be sufficient: the competitive conditions and the structure of supply and demand on the market must also be taken into consideration.", C-322/81 - *Michelin v Commission*, EU:C:1983:313 E.C.R.[1983] 03461, para 37; T-229/94 - *Deutsche Bahn v Commission*, EU:T:1997:155 E.C.R. [1997] II-01689, para 37.

¹⁴⁴ Commission Notice on the Definition of the Relevant Market for the Purposes of the Community Competition Law [1997] OJ C372/5, para 20-23. See also: Bishop and Walker, 119; Niels, Jenkins and Kavanagh, 68 to 74; Van Bael and Bellis, 138 to 139. For a US Antitrust perspective, see Hovenkamp, 108 to 113.

¹⁴⁵ Säcker, 37.

¹⁴⁶ Oinonen, 257 to 258.

¹⁴⁷ Baker [2007] 134.

¹⁴⁸ Oinonen, 263.

¹⁴⁹ Motta, 104

of demand substitution in terms of effectiveness and immediacy”.¹⁵⁰ The GC in *Clearstream v Commission* clarified that timely and effective means that “suppliers are able to switch production to the relevant products and market them in the short term without incurring significant additional costs or risks in response to small and permanent changes in relative prices”.¹⁵¹ From a practical perspective, these elements require sufficient spare production capacity and flexibility, no barriers to expansion, flexible contractual commitments with current sellers, no danger of defensive or retaliative strategies, and when it does not entail the need to adjust significantly tangible and intangible assets.¹⁵² Also, entrance will be timely, as suggested by Motta, if it occurs within six months up to one year.¹⁵³ Consequently, supply substitution will be irrelevant if the supplier’s ability to change its production does not affect the involved undertaking’s position in the market.¹⁵⁴ The Notice on Market Definition, however, considers this constraint as less immediate than demand substitution and requiring of an analysis of additional factors to be taken into account.¹⁵⁵ Absent timeliness and effectiveness, supply substitution will be considered only when dealing with market power assessment.

I put forward that in a buyer power case supply substitution – *supply buyer substitution* – is not to be understood as the reverse of a seller side case.¹⁵⁶ Supply buyer substitution would be the response of other buyers that were not originally purchasing the good (not part of the original market) that decide to acquire the input in response to the reduction in purchasing price, in opposition to other suppliers now producing the same output. This behavior is a reaction to the perceived new profit maximizing opportunity.¹⁵⁷ These additional purchases will have a disciplinary effect on the buying undertaking as other buyers aim at acquiring underpriced goods. As in the case of supply substitution, buyer substitution should not be overestimated when assessing competitive pressure from other buyers.¹⁵⁸ One example illustrates this effect. Buyer “A” located in the region of Cognac in France is a monopsonist buyer of the grape Ugni Blanc

¹⁵⁰ T-336/07 - *Telefónica and Telefónica de España v Commission*, EU:T:2012:172, para 113; See also: Commission Notice on the Definition of the Relevant Market for the Purposes of the Community Competition Law [1997] OJ C372/5, para 20-21; Füller in Hirsch, Montag and Säcker, 438 to 439; Säcker considers that supply substitutability also includes current competitors in Säcker, 37. The author does not share this opinion as current competitors (even if deciding to renew a product) and their products are part of supply side... (rethink this)

¹⁵¹ T-301/04 - *Clearstream v Commission*, EU:T:2009:317 E.C.R. [2009] II-03155, para 50.

¹⁵² Commission Notice on the Definition of the Relevant Market for the Purposes of the Community Competition Law [1997] OJ C372/5, para 20; Kokkoris [2006] 147; Säcker, 38 to 39.

¹⁵³ Motta, 103.

¹⁵⁴ Füller in Hirsch, Montag and Säcker, 444.

¹⁵⁵ Commission Notice on the Definition of the Relevant Market for the Purposes of the Community Competition Law [1997] OJ C372/5, para 14.

¹⁵⁶ Cf with Kokkoris who seems to use a traditional definition of supply substitution in buyer power cases in Kokkoris [2006] 147.

¹⁵⁷ Crocioni [2002] 355.

¹⁵⁸ See for supply substitution: Niels, Jenkins and Kavanagh, 71 to 74.

for the production of the liquor Cognac.¹⁵⁹ Due to a non-transitory decrease in the purchasing prices of Ugni Blanc, buyer “B” a red wine producer also located in Cognac, decides to acquire Ugni Blanc to also start producing Cognac. Because of its expertise in the production of grape-based alcoholic beverages, geographic location and spare capacity, “B” can effectively and immediately start buying grapes for Cognac production, thus being a supply-sided constraint vis-à-vis “A”.

Shortcomings of the current buyer oriented methodology

As it stands the Buyer’s SSNIP test must be subject to some criticism, a view also shared by some literature. Some of the criticisms are not only addressed to the buyer-side assessment, but to the SSNIP test methodology in general. I, nevertheless due to the scope of my research, address them from a buyer perspective only.

1. The Notice on Market Definition overlooks performing an additional market definition in the downstream market.¹⁶⁰ By failing to do so, the analysis does not consider the competitive effects of buyer power in the downstream market and only looks at the effects upstream. Not looking at the effects downstream market is at odds with an aggregated consumer welfare oriented competition policy and performing half of the analysis. A good example illustrating the importance of this dual-market definition approach is found in *British Airways v Commission*.¹⁶¹
2. This methodology may lead to situations in which the found relevant market is narrower than the real one. As a consequence, the undertaking will likely appear as having more market power than what it really has. This effect occurs as the Buyer’s SSNIP inquires whether a hypothetical purchasing firm would make more profits if the purchasing prices were 5-10 percent lower than the current level and not if a hypothetical monopsonist would reduce purchasing price by the same amount.¹⁶² Furthermore the Commission’s Notice is no explicit in indicating whether the reduction in purchasing prices should be performed in one price, some prices or all prices in the candidate market.¹⁶³

¹⁵⁹ The ECJ dealt with a buyer power-related case in C-123/83 - *BNIC v Clair*, ECLI:EU:C:1985:33, in which the main issue dealt with the fixing of minimum purchasing prices to limit the buyer power of purchasers of white grapes.

¹⁶⁰ The same opinion was given by the now extinct Competition Commission and Office of Fair Trading of the UK in the UK’s Contribution in OECD, *Policy Roundtables: Monopsony and Buyer Power* 231.

¹⁶¹ T-219/99 - *British Airways v Commission*, EU:T:2003:343 E.C.R. [2003] II-05917 and C-95/04P - *British Airways v Commission*, EU:C:2007:166 E.C.R. [2007] I-02331.

¹⁶² A similar criticism from a demand-side oriented perspective is found in: Bishop and Walker, 112.

¹⁶³ Øystein Daljord, Lars Sørgard and Øyvind Thomassen, ‘The SSNIP Test and Market Definition with the Aggregate Diversion Ratio: A Reply to Katz And Shapiro’ 4 *Journal of Competition Law and Economics* [2008]

Literature suggests that this should be done on a case-by-case assessment depending on the market's characteristics.¹⁶⁴

3. The application of a decrease in purchasing price in the range of 5-10 percent by a hypothetical monopsonist will arguably have a larger impact on its supplier than when compared to an increase in price for consumers, especially if the supply curve is very inelastic, and because of the ratio of profit a single large buyer represents to a supplier when compared to final end users acting individually. Due to the large proportion of the sales represented by a large buyer – and the dependency relation - a lower decrease in price might still have a very strong effect in the quantity supplied and the search of alternative buyers by the seller. Think, for example, of the agriculture sector. A supermarket chain that decreases its purchase prices by, say 4 percent, can still have a very strong effect on the supplier's response to the change in price because the farmer usually will face a very inelastic demand curve (for instance, the commodities it sells perish quickly if not properly refrigerated or seasonal factors) and, importantly, the supermarket is a necessary trading partner. This concern has been expressed in somewhat analogous terms by the Commission by reference to the “threat point” which is discussed in detail the section of market power assessment.¹⁶⁵ The threat point was defined as the ratio of purchases that a buyer represents for a seller upon which the loss of this client will endanger supplier's operability. In the Commission's assessment the threat point was deemed to be reached at the ratio of 22%.¹⁶⁶
4. When defining the market through the Buyer's SSNIP test it will tend to be composed by a smaller number of firms both in the supply side and in the demand side, than when compared to a relevant market with final consumers.¹⁶⁷ As a consequence the undertakings' market share will be rather large and the HHI level will tend to be concentrated, in either the supplier's side, the demand's, or both. This implies important consequences to consider at the market power assessment stage as market share and market concentration have to be analyzed under a slightly different perspective than the traditional analysis of EU competition law.¹⁶⁸ This, however, should be seen in the light

¹⁶⁴ Ibid.

¹⁶⁵ See Section 1.4.2. Also making reference to the threat point concerning the Carrefour/Promodes Decision see Ezrachi and Ioannidou [2014] 81

¹⁶⁶ Commission Decision COMP/M. 1684 – Carrefour/Promodes, [2000], para 52-55; Commission Decision IV/M.1221 — Rewe/Meinl [1999] OJ L274/1, para 101.

¹⁶⁷ Bundeskartellamt 5.

¹⁶⁸ Contrast with Dobson and Kokkoris.

that substantive buyer power arises under lower thresholds. Hence, a proper assessment of these tendencies must be made.

Case law illustrates that in several cases involving abuse of buyer power and concentration operations, the results given by the HHI and the market share are higher, and much higher in some occasions, than the traditional ranges.¹⁶⁹ In *Imperial Chemical Industries v Commission* the HHI that was calculated using as a reference the market share found in the Decision. It was of 8,150 and a market share of 90%, which indicates an almost monopsonistic position by Imperial Chemical Industries.¹⁷⁰ In *Irish Sugar v Commission* the HHI and market share were also very high. The calculated index ranged between 8100 and 7225 and the market share were of 90% and 88%, also indicating an almost monopsonistic position.¹⁷¹ In *Tomra and Others v Commission* the HHI and market share were also very high, although in this case the range between the minimum and maximum ends varied considerably ranging from 5625 up to a maximum of 9025 in accordance with the provided figures and the market share ranged from 70% to 95%.¹⁷²

In contrast with this tendency, in *British Airways v Commission* the ECJ confirmed that British Airways was a dominant undertaking with a market share of 39,7 percent of the total tickets sold by travel agents.¹⁷³ Not only *British Airways v Commission* is a breakthrough in cases of dominance because of the low market share threshold and because most buyer power cases the market share percentage of the dominant firm has been much higher. In *British Airways v Commission*, however, the “necessary trading partner” argument was of importance for finding dominance. This condition is explored in Section 4.3.2. of this same chapter.

¹⁶⁹ Cf with the concentration thresholds in the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, para 19-21, where i) concentrations below 1,000 HHI do not merit extensive analysis (unconcentrated markets); ii) it is unlikely to identify horizontal competition concerns in a merger with a post-merger HHI between 1 000 and 2 000 and a delta below 250, or a merger with a post-merger HHI above 2 000 and a delta below 150 (moderately concentrated markets).

¹⁷⁰ T-66/01- *Imperial Chemical Industries v Commission*, EU:T:2010:255 E.C.R. [2010] II-02631; and Commission relating to a proceeding under Article [101 TFEU] IV/33.133-A: *Soda ash – Solvay*, ICI [1991] OJ L152, p 1.

¹⁷¹ See: C-497-99 P - *Irish Sugar v Commission*, EU:C:2001:393 E.C.R. [2001] I-05333; T-228-97 - *Irish Sugar v Commission*, EU:T:1999:246 E.C.R. [1999] II-02969; and Commission Decision relating to a proceeding pursuant to Article [101] TFEU IV/34.621, 35.059/F-3 — *Irish Sugar plc* [1997] OJ L/258.

¹⁷² See, C-549/10 P-*Tomra and Others v Commission*, EU:C:2012:221 [2012]; T-155/06 - *Tomra Systems and Others v Commission*, EU:T:2010:370 E.C.R. [2010] II-04361; and Commission Decision relating to proceedings under Article 82 TFEU COMP/E-1/38.113 – *Prokent-Tomra* [2008] OJ C 219, p. 11, summarized version. The full version of the Decision can be accessed at: http://ec.europa.eu/competition/antitrust/cases/dec_docs/38113/38113_250_8.pdf, last visited 21May 2014.

¹⁷³ T-219/99 - *British Airways v Commission*, EU:T:2003:343 E.C.R. [2003] II-05917 and C-95/04P - *British Airways v Commission*, EU:C:2007:166 E.C.R. [2007] I-02331.

5. The Canadian Competition Bureau has pointed out that the relevant product market may include products that from the buyer's perspective are unrelated or not substitutes, which may appear to be contrary to the ECJ's case law.¹⁷⁴ This raises the question of whether the substitutability of products in buyer power cases must be defined through the relevant use of the buyer or the supplier.¹⁷⁵ Traditionally, suppliers, when facing a decrease in purchasing price, might switch their production towards another good or service,¹⁷⁶ for example mandarins instead of oranges. The problem will be that the market definition outcome will include both mandarins and oranges in the relevant product market which is incorrect from a buyer's perspective.

The answer to the question in EU law should be that the substitutability/interchangeability of goods in the upstream product market should be assessed from the *supplier's* perspective and not from the buyer's perspective by also taking into consideration "the structure of supply and demand on the market, and competitive conditions",¹⁷⁷ And reiterated in clearer terms in *CEAHR v Commission* when stating "The interchangeability or substitutability is not assessed solely in relation to the objective characteristics of the products and services at issue, but the competitive conditions and the structure of supply and demand on the market must also be taken into consideration".¹⁷⁸ This interpretation is made by analogy to seller cases in which it is the end consumer who judges the substitutability/interchangeability between products as settled by the ECJ in *United Brands v Commission*,¹⁷⁹ as well as by the Notice on Market Definition.¹⁸⁰

¹⁷⁴ Canadian contribution in OECD, *Policy Roundtables: Monopsony and Buyer Power* 144 to 145. Cf with C-27/76 - *United Brands v Commission*, EU:C:1978:22 E.C.R. [1978] 00207, para 22; C-6/72 - *Europemballage Corporation and Continental Can Company v Commission*, EU:C:1973:22 E.C.R. [1973] 00215, para 32.

¹⁷⁵ Füller in Hirsch, Montag and Säcker, 441.

¹⁷⁶ Canadian contribution in OECD, *Policy Roundtables: Monopsony and Buyer Power* 144 to 145.

¹⁷⁷ "For this purpose, therefore, an examination limited to the objective characteristics only of the relevant products cannot be sufficient: the competitive conditions and the structure of supply and demand on the market must also be taken into consideration". C-322/81 - *Michelin v Commission*, EU:C:1983:313 E.C.R. [1983] 03461, para 37; T-229/94 - *Deutsche Bahn v Commission*, EU:T:1997:155 E.C.R. [1997] II-01689, para 54.

¹⁷⁸ T-427/08 - *CEAHR v Commission*, EU:T:2010:517 E.C.R. [2010] II-05865, para 67. See also: T-219/99 - *British Airways v Commission*, EU:T:2003:343 E.C.R. [2003] II-05917, para 91

¹⁷⁹ C-27/76 - *United Brands v Commission*, EU:C:1978:22 E.C.R. [1978] 00207, para 12-35, wherein the ECJ decided that from the consumer's point of view bananas constitute a significantly different product market from other fruits.

¹⁸⁰ "A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable **by the consumer**, by reason of the products' characteristics, their prices and their intended use", Commission Notice on the Definition of the Relevant Market for the Purposes of the Community Competition Law [1997] OJ C372/5, para 7, (emphasis added), and recently ratified by the GC in T-336/07 - *Telefónica and Telefónica de España v Commission*, EU:T:2012:172, para 113; and T T-446/05 - *Amann & Söhne and Cousin Filterie v Commission*, EU:T:2010:165 E.C.R. [2010] II-01255, para 59.

6. Part of the literature criticizes this mere reverse methodology because in their opinion if a supplier is forced to price below competitive levels this would imply that “the supplier would not earn a normal profit over the long term and so would be **better off leaving the industry**”.¹⁸¹ This reveals two shortcomings. Firstly, a mere upstream market definition only captures monopsony effects but not bargaining power effects. Secondly, the Notice on Market Definition is not explicit when stating if the decrease in the purchasing price be above or below the competitive level. The differences are well illustrated by the quotation above: if below the competitive levels the supplier will be forced out of the business to avoid losses; if still within competitive levels, then the supplier will remain in the industry.

Applying the current approach involves knowing what it’s the current or competitive purchasing price, which is a challenging exercise. This is due to the fact that prices in intermediate markets – such as purchasing markets – are not readily available to end consumers or the general public, even if not protected under confidentiality clauses.¹⁸² In some cases the prices paid by a buyer to its suppliers will be confidential. Neither the supplier nor the buyer have incentives to reveal their price and much less costs to competitors and will use confidentiality clauses to protect prices. In other cases, and as remarked by Carstensen, transactions are entered into a one-on-one sales where buyer and seller have some flexibility to determine prices *ad hoc*.¹⁸³ These factors imply that purchasing prices paid for input are difficult to determine in practice.

7. Purchasing market definition ought to consider that purchasing contracts in some specific industries, like for example manufacturing input markets, are usually of long duration as opposed to most contracts among sellers and final consumers that are typically, but not always, a one-time deal. Consequently, this has to be factored when determining an appropriate “non-transitory” or “permanent” period when performing the Buyer’s SSNIP Test.¹⁸⁴

¹⁸¹ Office of Fair Trading para 1.77 (emphasis added).

¹⁸² Joe Harrington, “The Current State of the Theory of Collusion: Unexplained Phenomena and Unexplored Directions” (BECCLE Competition Policy Conference)

¹⁸³ Carstensen, ‘Buyer Cartels Versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy’ [2010] 19.

¹⁸⁴ American Bar Association, 55 to 56.

1.4.3. The hypothetical monopsony test: the OECD alternative

The OECD has proposed a methodology for market definition that centers its attention in monopsony cases.¹⁸⁵ The proposed methodology, the “*hypothetical monopsonist test*”, is drafted in general terms, providing guidance to agreement, dominance and merger cases. It consists in identifying the “smallest set of products in the smallest geographic area such that a hypothetical monopsonist of those products in that area would be able to depress prices by a small but significant and non-transitory amount.”¹⁸⁶ In this test the product market would be defined as the productive assets over which a buyer could exercise monopsony power. To do so, the key lies on recognizing the existence of alternative channels for the seller, which is very similar to the Buyer’s SSNIP test described in the Notice on Market Definition.¹⁸⁷ The more alternative buyers are, the less monopsony power the undertaking has. For bargaining power cases the OECD does not provide an explicit methodology for defining the relevant market – the hypothetical monopsonist test can be employed –; instead the focus is on its measurement, which is discussed in Section 4.3 of this chapter.

Under the *hypothetical monopsonist test* the outcome is similar to the standard hypothetical monopolist test.¹⁸⁸ The result will determine the smallest group of goods that can be profitably monopsonized by a hypothetical monopsonist by withholding demand to decrease purchasing prices below competitive levels.¹⁸⁹ In my view, the *hypothetical monopsonist test* is a more detailed, refined and modern methodology than the proposed in the Notice on Market Definition by the Commission. The differences, however, are not many.

The OECD suggests using two different base prices when applying the test. If the case is retrospective – typically a dominance case –, then the base price would be the competitive levels. If the case is prospective – typically a concentration operation –, then the base price will be the current price, unless it is reasonable to expect that the price for the input is going to rise.¹⁹⁰ This is an improvement compared to the vague rule on price levels set in the Notice on Market Definition.¹⁹¹ Importantly, the OECD does not suggest what should be the range of the price decrease, arguably due to the different approaches in the EU and US competition methodologies.

¹⁸⁵ OECD, *Policy Roundtables: Monopsony and Buyer Power* 34 and 42.

¹⁸⁶ *Ibid.*

¹⁸⁷ *Ibid.*

¹⁸⁸ For thorough discussion on the hypothetical monopolist test see *inter alia*: Bishop and Walker, 111 to 124; Niels, Jenkins and Kavanagh, 37 to 56.

¹⁸⁹ OECD, *Policy Roundtables: Monopsony and Buyer Power* 34

¹⁹⁰ *Ibid.*

¹⁹¹ Commission Notice on the Definition of the Relevant Market for the Purposes of the Community Competition Law [1997] OJ C372/5, para 19.

In accordance with the test the undertaking is said to have limited monopsony power when it is proven that the sellers can easily find other buyers. The OECD distinguishes 3 cases:

- i) Other buyers that acquire the input for different uses than the undertaking under investigation;
- ii) Other buyers located in a different geographic areas that acquire the input for similar uses as the undertaking under investigation;
- iii) And lastly, other buyers for whom the assets can be used to make a different input.

The *hypothetical monopsonist test* proposed by the OECD constitutes an improvement over the Buyer's SSNIP suggested in the Notice on Market Definition as it provides a more detailed test account. Also, despite the fact that the OECD expressly named this methodology as hypothetical monopsonist test it does not mean that it cannot be applied in bargaining power cases. The test does not answer if the conduct implies a monopsony or bargaining power effect; what it does is to define the boundaries in which the undertaking's conduct will be analyzed. Lastly, despite of its specificity, however, the *hypothetical monopsonist test* does not expressly indicate the need of performing a dual relevant market definition as I suggest. To me this one sided orientation is a deficiency of the proposed methodology.

1.4.4. Buyer's market definition in some Member States

Ability of suppliers to switch to alternative sale opportunities: The Bundeskartellamt approach

The Bundeskartellamt has proposed a similar structural approach focusing on evaluating the ability of suppliers to switch to alternative sale opportunities. Market "definition focuses on the products the supplier is offering or would be able to offer *without any significant problems*. With these products in view it has to be asked which (alternative) sales channels could be services in an economically viable manner".¹⁹² The demand-side oriented market definition by the Bundeskartellamt does not contemplate explicitly the application of a Buyer's SSNIP test but to determine whether the supplier would be able to offer its products without any significant problems it seems to apply it. Furthermore, the Background paper does not address the difficult question of what level of prices to use as basis of the SSNIP test nor which is the decrease in percentage that will be used in the reverse test.

¹⁹² Bundeskartellamt 5 (emphasis added).

Defining a relevant purchasing market in the UK: a dualistic approach

In the UK the Guidance Notice on Market Definition sets the methodology for determining the relevant market in an investigation.¹⁹³ The Guidance Notice on Market Definition does not contain any direct mention on how market definition is to be done in a buyer power case. It, however, follows Commission Notice on Market Definition and builds upon it.¹⁹⁴

Nevertheless, the UK's contribution in the OECD Roundtable on Monopsony and Buyer Power of 2009 provides further and more detailed information regarding market definition in such cases.¹⁹⁵ The contribution rightly points out that measuring and defining markets for buyer power cases is not straightforward. As most buyer power theories of harm¹⁹⁶ involve an undertaking with market power upstream and downstream, the UK NCA takes the view that it might "be necessary to *define and analyse markets at a number of different levels* in the supply chain".¹⁹⁷ This solution appears to condition the dualistic approach to the existence of a theory of harm that involves competitive issues in both markets. In my view there is no need to make such a pre-condition because all buyer power problems will have some downstream implication.

The Competition and Markets Authority distinguishes three different scenarios for defining the relevant market in buyer power cases:

- i) In the case of countervailing buyer power, buyer power is seen as "a potential, benign, constraint on the exercise of supplier market power, buyer power will be assessed within the supply market of concern".¹⁹⁸ Examples of such supply market concerned definition are found in EU competition law practice, for instance in the concentrations cases *Nestlé/Perrier*¹⁹⁹ and *Enso/Stora*.²⁰⁰ In my view, however the analysis of countervailing buyer power is made at the market power assessment and not at the relevant market definition stage.

¹⁹³ Office of Fair Trading, 'Market Definition: Understanding competition law' [2004], the Competition and Markets Authority makes the disclaimer, however, that the Guidance Notice was retained unamended and, therefore, does not reflect the changes in the case law, legislation or practice.

¹⁹⁴ *Ibid.* Also stressing the common ground between the guidelines, see Graham, 23.

¹⁹⁵ See the UK's Contribution, jointly prepared by the now extinct Competition Commission and Office of Fair Trading, in OECD, *Policy Roundtables: Monopsony and Buyer Power* 229 to 243.

¹⁹⁶ For a general discussion on theories of harm and EU competition law see: Hans Zenger and Mike Walker, *Theories of Harm in European Competition Law: A Progress Report* (Jacques Bourgeois and Denis Waelbroeck eds, Bruylant 2013) available at <http://ssrn.com/abstract=2009296>.

¹⁹⁷ UK Contribution, jointly prepared by the now extinct Competition Commission and Office of Fair Trading, in OECD, *Policy Roundtables: Monopsony and Buyer Power* 229 (emphasis added).

¹⁹⁸ *Ibid.* 239.

¹⁹⁹ Commission Decision relating to a proceeding under Council Regulation (IV/M 190 Nestlé/Perrier [1992] OJ L 356/1.

²⁰⁰ Decision 1999/641/EC declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement IV/M.1225 - Enso/Stora [1999] OJ L 254, p. 9.

- ii) When buyer power is seen as abusive, then the markets to be defined will depend on whether the abusive behavior is *exclusionary* or *exploitative*. If exploitative (consumer harm), the UK NCA argues that “(d)ownstream markets would be defined in the normal way using the hypothetical monopolist test and then the degree of potential buyer power is assessed in this context”.²⁰¹ If the conduct is deemed as exclusionary (competitor harm) then the question is which market must be defined. This implies that, on occasions, market definition might involve more than a single market.
- iii) Additionally, if the buyer power is exercised in a market but has consequences on another then assessment must be made in the two markets.²⁰²

The UK’s approach to buyer power market definition is case-by-case oriented and depending on what effects are presumed by the theory of harm used as a starting point. It presupposes a theory of harm that will guide the rest of the market definition process. It, however, fails to provide detailed account on the process itself of defining the relevant market from a seller’s perspective. Additionally, this casuistic approach might be criticized for being too case specific and for compromising legal certainty. To me, however, the approach by the UK does not compromise legal certainty if the three alternatives are properly understood and applied in a consistent manner. Furthermore, the employment of a theory of harm to guide the design of the case is a common practice among competition authorities and, therefore, not a source of real concern.

1.4.5. Buyer’s market definition in US Antitrust

The Horizontal Merger Guidelines (“US-HMG”), published by U.S. Department of Justice and the Federal Trade Commission in 2010, were firstly developed in 1982 and introduced the hypothetical monopolist test to determine the relevant market.²⁰³ The US-HMG are drafted mainly addressing merger cases. However, the US courts and literature have found them also relevant in clarifying the methodology for cartel and monopolization cases.²⁰⁴ As in EU

²⁰¹ UK Contribution, jointly prepared by the now extinct Competition Commission and Office of Fair Trading, in OECD, *Policy Roundtables: Monopsony and Buyer Power* 239.

²⁰² Ibid.

²⁰³ For an overview of the main changes introduced by the 2010 Horizontal Merger Guidelines see: Richard A Feinstein, ‘2010 Revisions to the US Horizontal Merger Guidelines’ 7 *Competition law International* [2011].

²⁰⁴ For a similar opinion on the relevance of the Horizontal Merger Guidelines in monopolization cases see Einer Elhauge and Damien Geradin, *Global Competition Law and Economics, 2nd Edition* (Hart Publishing Ltd 2011) 304 to 317; Hovenkamp, 129.

competition law, these guidelines are not binding on the courts but are helpful in providing an analytical framework to evaluate the case.²⁰⁵

Market definition in US Antitrust, some generalities

The US-HMG develop a thorough methodology towards market definition. One of the new features of the 2010 US-HMG is that market definition in merger cases does not need to be the first step in the assessment,²⁰⁶ breaking with more than 50 years of precedent as remarked by Coate and Fischer.²⁰⁷ Instead, the Agencies use additional tools to assess competitive effects in a direct manner. Like the Notice on Market Definition, the relevant market assessment is made through the hypothetical monopolist test and uses also a product and geographic market dimension.²⁰⁸ Unlike the Notice on Market Definition, the US-HMG takes only into consideration demand substitution as a constraint factor; this is, the customer's ability to substitute one product to another in response to an increase in price or a corresponding non-price change such as reduction in quality or service.²⁰⁹ Supply substitutability is not taking into account at the stage of defining the relevant market by the US-HMG. It will only be considered at the market power assessment stage as part of the identification of market participants and possible entrants, regardless whether the entry is timely and effective.²¹⁰

Buyer's market definition in US Antitrust

Section 12 of the US-HMG devotes an entire new section on the topic of Mergers of Competing Buyers in addition to the general market definition methodology developed in the guidelines.²¹¹ To evaluate buyer market power –monopsony power- the US-HMG adopt “essentially the framework described above for evaluating whether a merger is likely to enhance market power on the selling side of the market”.²¹² As with the Notice on Market Definition and the OECD's hypothetical monopsonist test, the focus is determining if there are alternatives available to sellers when facing a decrease in the price paid by the *hypothetical monopsonist*. The US-HMG do not expressly distinguish between monopsony power effects or bargaining power effects and

²⁰⁵ American Bar Association, 6; *New York v. Kraft Gen. Foods*, 926 F. Supp. 321, 359 n.9 S.D.N.Y. [1995]. See also: Hovenkamp, 129 to 134.

²⁰⁶ U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines (2010), pg. 7; American Bar Association, 7 to 8.

²⁰⁷ Malcolm B. Coate and Jeffrey H. Fischer, ‘Is market definition still needed after all these years’ [2014].

²⁰⁸ For a thorough discussion of the test in US Antitrust, see: Areeda, Hovenkamp and Solow, 284 to 307.

²⁰⁹ U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines [2010], pg. 7.

²¹⁰ Gavil, Kovacic and Baker, 492.

²¹¹ U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines [2010], pg. 32. For a detailed analysis of this section see Carstensen, ‘Buyer Power and the Horizontal Merger Guidelines: Minor Progress on an Important Issue’ [2012]

²¹² U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines [2010], pg. 32.

neither provides with a thorough analysis as when compared to selling side cases.²¹³ However, like all other methodologies it can be applied in both cases.

The methodology for the hypothetical monopsonist is analogous to the standard methodology described at length in the US-HMG.²¹⁴ The hypothetical monopsonist test is applied as part of the product and geographic market analysis. Once it is carried out, the market shares of the merging parties are calculated. Then its market power is assessed. Buyer market power will not be a significant concern when suppliers have “numerous attractive outlets for their goods or services”.²¹⁵ On the contrary, if this is not the case, then the creation of buyer power is “**likely to lessen competition in a manner harmful to sellers**”.²¹⁶

In sum, the US-HMG provide a similar approach as the Notice on Market Definition when defining the relevant buying market in a partial manner. It proposes performing a *hypothetical monopsonist test* to determine the market solely upstream market power capturing mostly monopsony effects. No additional downstream relevant market analysis is suggested which leads to an incomplete picture of the effects of buyer power cases.

1.4.6. Buyer’s market definition in Canada

Canada is another jurisdiction in which its NCA has devoted a specific section of its Merger Guidelines to address a merger between buyers increasing their buying market power.²¹⁷ The relevant market definition employs a the hypothetical monopsonist test to define “the smallest group of products and the smallest geographic area in which a sole profit-maximizing buyer (a “hypothetical monopsonist”) would impose and sustain a significant and non-transitory price decrease below levels that would likely exist in the absence of the merger”.²¹⁸ Thus, it follows the general trend of applying a mirrored analysis as most other jurisdictions suggest without any specific demand of performing a downstream market analysis

²¹³ Carstensen, ‘Buyer Power and the Horizontal Merger Guidelines: Minor Progress on an Important Issue’ [2012] 781.

²¹⁴ U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines [2010], pgs. 7-19.

²¹⁵ U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines [2010], pg. 33; Feinstein [2011] 9.

²¹⁶ U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines [2010], pg. 33, (emphasis added).

²¹⁷ Canadian Competition Bureau, *Merger Enforcement Guidelines* (2011) Section 9. For a general overview of market definition in Canada, see Brian Facey and Cassandra Brown, *Competition and Antitrust Laws in Canada* (Lexis Nexis 2013) 131 to 204.

²¹⁸ Canadian Competition Bureau.

1.5. Buyer market power assessment

In the following section I discuss the assessment of buyer market power from an *active* perspective, i.e. when the undertaking investigated is a buyer. In turn, the assessment of buyer power is also subject of analysis from a *passive* perspective when it is appraised as a neutralizing factor of seller market power, called countervailing buyer power.

In this section I put forward that the measurement of market power in buyer-side cases also ought to follow a dualistic approach to fully capture the specificities of the exercise of buyer power and its repercussions in the upstream and downstream markets. This is done by taking into account the competitive structure of buying markets and interpreting the relation between them as suggested by the Commission.²¹⁹

My discussion is centered in the analysis of five assessment tools that have been employed by the case law and the literature that synthesize and interpret the different market power sources. These assessment tools, namely: market shares, market concentration, alternative supply sources, gate-keeping role and dependency, are quantitative indicators that guide the decision making body in determining if an undertaking possesses market power or not. In my discussion I evaluate them from a buyer-oriented perspective and following the dualistic approach to market definition.

To structure my analysis I have drafted this section as follows: firstly, I discuss the notion of market power at large; then, I analyze the assessment tools suggested for the active evaluation of buyer market power; thirdly, I analyze the Buyer Power Index as a direct methodology for measuring of buyer power. I conclude this section with a summary of the findings and the limitations and shortcomings of the dualistic approach to buyer power market definition.

1.5.1. Introduction

The market power assessment phase allows for the measurement of an undertaking's market power. In practice it is carried out after defining the relevant market; consequently its accuracy relies on the appropriateness of such market definition.²²⁰

From a conceptual perspective, market power, in the neoclassical sense, is the capacity of an undertaking to profitably sustain prices above – or below in buyer power cases –,²²¹ or restrict output, or quality below competitive levels by charging a price above –or below– marginal

²¹⁹ Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7, para 12.

²²⁰ David A. Hyman and William E. Kovacic, 'Monopoly, Monopsony, And Market Definition: An Antitrust Perspective On Market Concentration Among Health Insurers' 23 Health Affairs [2004]; Richard A. Posner, *Antitrust law: an economic perspective* (University of Chicago Press 1976) 125

²²¹ Highlighting the need for the increase or decrease of prices remain profitable, see: Posner and Landes [1980] 937.

costs.²²² In practical terms and following Hay's definition, market power expresses the idea of the "potential for consumers to suffer injury through the actions of a single firm or a group of firms acting in concert".²²³ Market power can be enjoyed by both selling and buying undertakings without changing its nature, what changes is the way that is exercised: by increasing or lowering prices below the competitive levels, respectively. This market power definition entails three elements: i) its exercise will reduce output or input; ii) the price increase or decrease must be profitable in a medium and short term; and iii) market power is usually exercised relative to the benchmark of effective competition.²²⁴

Undertakings have different degrees of market power (including bargaining power),²²⁵ with monopoly (or monopsony) power being the extreme case.²²⁶ As no real market is perfectly competitive all undertakings have a certain degree of market power,²²⁷ even if this may imply that they are pricing below average costs.²²⁸ This means that even if a buyer enjoys substantial purchasing power it not necessarily implies that the undertaking is dominant as remarked by Posner and Landes.²²⁹

In opposition to the neo-classical concept Monti identifies three other definitions of market power.²³⁰ A first alternative definition is to inquire whether the firm has a greater commercial strength than others in the market, such as in the case of economic dependence regarding buyer power.²³¹ A second definition inspired in post-Chicago economics defines it as the ability of an undertaking to devise strategies that harms rivals – exclusionary power - to then profitably raise or decrease prices. Lastly, market power can be defined as a jurisdictional concept, for example as using market share thresholds to create safe harbors precluding the application of EU

²²² Office of Fair Trading, 'Assessment of market power: Understanding competition law' [December 2004]. A similar definition is proposed in Bishop and Walker, 51; Niels, Jenkins and Kavanagh, 116. See also: Hovenkamp, 80; Areeda, Hovenkamp and Solow, 109.

²²³ Hay [1991-1992] 808.

²²⁴ Bishop and Walker, 53 to 61

²²⁵ Hay [1991-1992] 813 to 814; John B. Kirkwood, 'Collusion to Control a Powerful Customer: Amazon, E-Books, And Antitrust Policy' 69 University of Miami Law Review [2014].

²²⁶ Thomas D. Morgan, *Cases and materials on modern antitrust law and its origins* (4th edn, West Publishing Company 2009) 75. Bergh and Camesasca, 75.

²²⁷ Giorgio Monti, *EC competition law* (Cambridge University Press 2007) 124.

²²⁸ Hay [1991-1992] 813.

²²⁹ Posner and Landes define monopoly power as a high degree of market power in Posner and Landes [1980] 937. For a discussion on the need of this distinction see: Hay [1991-1992] 818 to 819.

²³⁰ Monti, 124 to 127; and the same idea but proposed as four concepts of dominance see: Giorgio Monti, 'The Concept of Dominance in Article 82' 2 European Competition Journal [2006]. For the discussion of different definitions of market power in US Antitrust see, inter alia: American Bar Association, *Market Power Handbook: Competition Law and Economic Foundations* (ABA Section of Antitrust Law ed, 2012) 1 to 11.

²³¹ For the discussion of economic dependence as a market power assessment tool, see infra section 1.4.2.5.

competition rules, such as the *de minimis* doctrine or the block exemption regulations.²³² In this paper I employ the neo-classical definition of market power unless stated otherwise.

Buyer market power: dual market power assessment

In buyer power cases the market power assessment must be made in the two markets in which the undertaking under investigation carries out its economic activity as a buyer and seller, respectively. This is the consequence of adopting a dualistic market definition for buyer power cases. By doing so, the market power assessment considers the case particularities and captures its effects on all the related markets. In particular, the assessment ought to determine if in addition to buyer power enjoys significant selling power to then analyze the competitive effects in both markets. If the assessment refers only to the upstream market the analysis would only take into account welfare effects upstream and wealth transfer between supplier and buyer and will disregard any welfare effects in the downstream market vis-à-vis end consumers. Limiting then market power assessment in such a way will show half the picture of the behavior's consequences and it would be inconsistent with the ordoliberal aggregated consumer welfare standard used as a benchmark in this paper. Therefore, I submit that buyer market power assessment must measure the trade-offs between the undertaking's purchaser buyer power and its seller power.²³³

One of the main findings of my research is that buyer power (and particularly bargaining power) can be exercised under quite different levels of market power in comparison to seller side cases.²³⁴ The main reason behind this is that the buyer, is the “decider” of the transaction as it is the one making the key decisions.²³⁵ Additionally, there is also a substantive difference in the levels of market power needed to exercise monopsony and bargaining power. For monopsony power to be exercised for a non-transitory period the undertaking must have a fairly large degree of market power that is akin to being dominant or being very close to it. This, however, is not shared by Carstensen who claims that “monopsony arises at lower market shares and so is more pervasive” (than seller power).²³⁶ I disagree with this with regard to monopsony power but not regarding bargaining power. In my view, monopsony power and the withholding effect can only exist profitably and for a substantial period of time if an undertaking is vastly dominant and

²³² See: Notice on Agreements of Minor Importance which do not Appreciably Restrict Competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice), [2014] OJ C291/1, para 2 and 12. See also the ECJ Judgment in C-226/11 – *Expedia*, EU:C:2012:795 [2012], para 23-29 in which the ECJ considers it as non-binding neither for the NCAs nor the courts of the Member States.

²³³ Somewhat similar but regarding the valuation of the economic welfare effects of buyer power was the idea expressed in Dobson and others [2000] 4.

²³⁴ Also supporting this see: Carstensen, ‘Buyer Power and the Horizontal Merger Guidelines: Minor Progress on an Important Issue’ [2012] 782

²³⁵ *Ibid* 783.

²³⁶ *Ibid* 799.

where there are significant entry barriers to the purchasing market. The case law, economics of monopsony power and its sources corroborate this. Contrarily, for bargaining power to be exercised, even as to generate a degree of relative dependence between the supplier and the buyer, the degree of substantial market power can be much lower and does not need to be equal nor close to a traditional seller dominance position.²³⁷ This opens several interesting questions for further research as they are out of the scope of this paper. i) If dominance is not required to exercise abusive purchasing bargaining power how can this be tackled by EU competition law?; ii) can the bargaining power of a non-dominant undertaking be abusive or it is just a mere transfer of profit between the parties?; iii) is unfair competition a better suited instrument to regulate the conduct of powerful but not dominant buyers?

1.5.2. Measuring the buying's undertaking market power

The measurement of a buying undertaking's market power is directly connected with buyer power sources but its nature does not influence the type of assessment tool used to measure it. Part of the literature, however, argues that in the assessment phase the decision making body ought to distinguish between evaluating monopsony market power and bargaining market power.²³⁸ In my view the distinction should be made at the source level but not at the assessment level because buyer power sources *explain* its origin whereas these assessment tools *quantify* its degree. Furthermore, the assessment tools I analyze are useful for a holistic appraisal of buyer market power and can be applied to both types of buyer power indistinctively, unless noted otherwise. In other words, determining the degree of buyer power can be carried out by resorting to these assessment tools regardless of the market power origin. However, and as held through this thesis, what should be distinguished from the outset is whether the market power exercised is in the form of monopsony effect or bargaining power effect. What determines if the effect is of monopsony or bargaining power is not the existence of buyer power but the characteristics of the behavior.

This section analyzes five assessment tools that case law and authoritative sources have remarked as the most relevant in the determination of buyer market power, namely: market shares, market concentration, alternative supply sources, gate-keeping role and dependency. These factors in conjunction represent by and large the synthesization of buyer power sources. The assessment tools are not exclusive to buyer market power measurement and are also frequently used for

²³⁷ Also suggesting that substantial buyer power may arise in the presence of relatively small market shares see Chris Doyle and Roman Inderst, 'Some economics on the treatment of buyer power in antitrust' 28 *European Competition Law Review* [2007].

²³⁸ OECD, *Policy Roundtables: Monopsony and Buyer Power* 42; Office of Fair Trading, *The competitive effects of buyer groups*.

seller-side cases. The focus of my discussion is on the particularities of its use in buyer power cases.

Assessment tools

1.5.2.1. Market shares

Market shares are a useful first indication but not a precise proxy for market power *lato sensu* as repeatedly clarified by the ECJ.²³⁹ They act as a rebuttable presumption of market power,²⁴⁰ but not of prices above (or below) marginal costs.²⁴¹ In general, the higher the market share the higher the undertaking's market power and the existence of large market shares is a highly important element for the existence of dominance.²⁴² The same applies for buyer power cases, in principle, the more the buyer represents a substantial portion of purchases in the market the more buyer power it will have.²⁴³ Importantly, however, the practice and theory support the view that substantial bargaining power – collectively or individually – may exist with a lower market share as when compared to a selling side situation, driven mainly because of the “upper hand” a buyer has in a negotiation vis-à-vis the seller.²⁴⁴

From a procedural perspective, market shares are calculated after the relevant market has been defined upstream and downstream, following the proposed dualistic approach.²⁴⁵ Importantly, in the upstream market the market share computation should include all buyers and not only those

²³⁹ C-85/76 - *Hoffmann-La Roche v Commission*, EU:C:1979:36 E.C.R. [1979 00461], para 39-41; Case T-340/03 *France Télécom v Commission*, EU:T:2007:22 E.C.R. [2007] II-00107, para 100. Also expressed in the Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7, para 13. Also applies in concentration cases as stated in the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, para 14. See also a US Antitrust perspective in Ernest Gellhorn, Stephen Calkins and William E. Kovacic, *Antitrust law and economics in a nutshell* (Thomson/West 2004) 132 to 140; Association, *Market Power Handbook: Competition Law and Economic Foundations* 93.

²⁴⁰ C-62/86 - *AKZO v Commission*, EU:C:1991:286 E.C.R. [1991] I-03359, para 60; Hay [1991-1992] 822. Cf with the critical view of market share's suitability of Carlton who claims that “the definition of a market and the use of market shares and changes in market shares are at best crude first steps to begin an analysis. I would use them to eliminate frivolous antitrust cases when shares are low, but would use them cautiously for anything else.”, in Carlton [2007] 3.

²⁴¹ Werden [2014] 4.

²⁴² C-85/76 - *Hoffmann-La Roche v Commission*, EU:C:1979:36 E.C.R. [1979 00461], para 39. Similarly, see: Hay [1991-1992] 821 821; Areeda, Hovenkamp and Solow, 243; Motta, 117; Cook and Kerse, 235; Niels, Jenkins and Kavanagh, 124.

²⁴³ Similarly, see: Guidelines on Vertical Restraints [2010] OJ C 130/1, para 116; Dobson and others [2000] 9; Doyle and Inderst [2007] 215; Ariel, Ezrachi and Koen. De Jong, ‘Buyer power, private labels and the welfare consequences of quality erosion’ 33 *European Competition Law Review* [2012].

²⁴⁴ Carstensen, ‘Buyer Cartels Versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy’ [2010] 6; Doyle and Inderst [2007] 215

²⁴⁵ Monti, 143.

buyers that also compete downstream with the involved undertaking.²⁴⁶ For example, in the case of a purchasing market for oil the computation must include buyers that acquire oil to process it into gasoline and buyers that acquire oil and process it as plastic.²⁴⁷

The Notice on Market Definition computes market shares based on the sales of the products in the relevant area.²⁴⁸ In a buyer power case this is represented by the proportion of the relevant product acquired by the involved undertaking.²⁴⁹ In practice this is calculated through companies' estimates, and industry studies carried out by consultants or trade associations. If the data is not available, then the Commission requests the information directly to the undertaking. Other indicators, however, can be used to offer useful information for the calculation and valuation of market share such as: capacity, the number of players in bidding markets, units of fleet as in aerospace, or the reserves held in case sectors such as mining.²⁵⁰

Market share analysis must be wary of important shortcomings.²⁵¹ Firstly, as market shares are directly derived from the market definition any flaws in the determination of the latter will impact the outcome of the former. Secondly, as recognized by EU law,²⁵² the market shares interpretation must be made in its relative context and not in *abstracto*. Thirdly market share analysis pays no regard to barriers of entry or exit in a given market, in this sense it is static. Fourthly and as noted by Hay, market share analysis is a backward-looking concept (in the case of Art. 101 and 102 cases, but not for concentration cases), whereas market power is dynamic because “the degree of market power enjoyed by a firm depends on how much business it will lose to rivals *if* it attempts to raise prices above competitive levels.”²⁵³

²⁴⁶Chen [2007] 18;

²⁴⁷ Carstensen, ‘Buyer Cartels Versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy’ [2010] 19.

²⁴⁸ Commission Notice on the Definition of the Relevant Market for the Purposes of the Community Competition Law [1997] OJ C372/5, para 53. Market shares can be calculated regarding sales, quantity, amount of suppliers, capacity, etc. Hovenkamp points out that other data can be used in the computing of market shares, such as revenue, units of output manufactured, units of output sold, capacity or a mix of these variables. If markets are competitive, using any of these indicators will tend to give the same result, see: Hovenkamp, 122.

²⁴⁹ Dobson and others [2000] 19.

²⁵⁰ Commission Notice on the Definition of the Relevant Market for the Purposes of the Community Competition Law [1997] OJ C372/5, para 54.

²⁵¹ Raising these issues see, inter alia: Hay [1991-1992] 821 to 822; Oinonen, 169 to 170; Niels, Jenkins and Kavanagh, 123 to 124.

²⁵² C-85/76 - *Hoffmann-La Roche v Commission*, EU:C:1979:36 E.C.R. [1979 00461], para 40-41. See also Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7, para 14.

²⁵³ Hay [1991-1992] 821 to 822.

Market shares thresholds – a buyer’s approach

In EU Competition law market share thresholds serve as preliminary indications of whether an undertaking (or group of) enjoys of substantial market power that might lead to dominance, if a concentration may lead to a significant impediment of effective competition, or whether a concerted behavior has a significant effect in the common market. Consequently, the case law and the Commission provide with *iuris tantum* presumptions that market shares reaching to a specific threshold may indicate the presence of (buyer) market power. From a negative perspective these market share thresholds act as safe harbors for firms to be relatively safe concerning the application of competition law.²⁵⁴ Most of those indicators have originated from seller side cases. In the following paragraphs I briefly discuss these thresholds to then compare them with buyer power cases.

i. Standard thresholds

Concerning the application of Article 102 TFEU the ECJ has established in *AKZO v Commission* that a finding of 50% market share constitutes a rebuttable presumption for the existence of dominance.²⁵⁵ The Commission has stated that dominance is unlikely if the undertaking’s market share is below 40%, unless specific circumstances make competitor’s constraint ineffectively.²⁵⁶ However, in *British Airways v Commission*, a buyer power case, dominance was found with a market share below 40%.

In concentration cases, market shares are used for determining if the concentration would lead to significant impediment of effective competition, particularly but not exclusively due to the creation or strengthening of a dominant position.²⁵⁷ The Commission takes into consideration market shares of the merging firms pre and post-merger to evaluate the impact of the operation. The practice in buyer power cases shows that mergers between two or more buyers may significantly impede competition, if no proper commitments are entered into, even if the parties have substantially less than 40% of market share post-merger vis-à-vis its suppliers as it happened in the buyer mergers of *Rewe/Meinl*²⁵⁸ and *Carrefour/Promodes*.²⁵⁹

²⁵⁴ Carlton [2007] 4. Monti, 124 to 127.

²⁵⁵ C-62/86 - *AKZO v Commission*, EU:C:1991:286 E.C.R. [1991] I-03359, para 60. Contrast this with the US Antitrust case law that holds that it is doubtful that market shares as high as 60 or 70% are enough to determine monopolization cases, see *United States v. Aluminum Co. of America (Alcoa)*, 148 F.2d 416, 424 (2d Cir. [1945]).

²⁵⁶ Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7, para 14. See also for concentration cases a similar view on the applicable thresholds in the Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, para 17.

²⁵⁷ Council Regulation (EC) 139/2004 on the Control of Concentrations between Undertakings [2004] L 24/1, Article 2.3.

²⁵⁸ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, para 17.

Additionally, market shares are also used as an indicator for delineating “safe harbors” inside of which agreements and concentrations are deemed as falling outside of the prohibitions because of their non-significant effect on trade between Member States.²⁶⁰ In the case of agreements the Commission has stated that an agreement will not appreciably effect competition if: i) it is entered into by competing undertakings with an aggregate market share not exceeding 10% the relevant market; and ii) if it is entered into by non-competing parties none of which not exceed a market share of 15% in its respective relevant market. For concentrations there is a rebuttable presumption that operations in which the combined undertakings’ market share does not exceed 25% either in the common market or in a substantial part of it are not liable to impede effective competition.²⁶¹

ii. Thresholds under buyer power cases

In the case of buyer power, and *in particular bargaining power*, the case law and the Commission’s practice reveals that EU competition law appears to demand substantially lower market share thresholds for buyer power cases that when compared with seller-side cases. This appears to be the case for all spheres of competition law: agreements, dominance and concentration cases.

As discussed below, bargaining power can be exercised without the undertaking being dominant as pointed out by the literature.²⁶² This implies that an undertaking may enjoy substantive market power even with relatively low market shares. The conundrum posed by this situation is that a non-dominant buyer may exercise *unfairly* competitive but not-punishable buyer power against its suppliers and, therefore, outside the traditional EU competition law’s scope.²⁶³

The same, however, does not hold true for monopsony cases. For monopsony power to be applied in a profitable and non-transitory manner it is required the existence of a sole (or few and arguably very large) buyers as discussed in this paper. In other words, it is very unlikely that monopsony power may exist in the absence of dominance. Hence, the following discussion is mainly oriented to the setting of guiding threshold for the appearance of bargaining power.

²⁵⁹ Commission Decision COMP/M. 1684 – Carrefour/Promodes, [2000], para 52-55.

²⁶⁰ C-5/69 - *Voelk v Vervaecke*, ECLI:EU:C:1969:35, E.C.R. [1969] 00295, 5/7.

²⁶¹ Council Regulation (EC) 139/2004 on the Control of Concentrations between Undertakings [2004] L 24/1, recital 32.

²⁶² John B Kirkwood, ‘Buyer Power and Exclusionary Conduct: Should Brooke Group Set the Standards for Buyer-Induced Price Discrimination and Predatory Bidding?’ 72 *Antitrust Law Journal* [2004-2005]; Chen [2007] 31; Buttà and Pezzoli [2014] 165

²⁶³ See also raising this concern and suggesting that a possible solution should be the implementation of unfair competition law in Pera. See also highlighting the little room for application of abuse of dominance in buyer power cases and the adoption of *ad-hoc* solutions: Buttà and Pezzoli [2014].

Concerning dominance and as mentioned *supra*, in the exceptional²⁶⁴ case of *British Airways v Commission* the ECJ confirmed the GC's Judgment that an undertaking with a market share of 39,7% in the downstream market of the sale of airline tickets and also a very high market share in the upstream market of purchasing of travel agencies services may be in a situation of dominance with respect to its competitors.²⁶⁵ In this case British Airways, when purchasing travel agency services, accorded to grant some incentives to travel agents based on volume of airline tickets sold to clients. The central question was whether such incentive mechanisms (in the form of reverse rebates) granted to travel agents when purchasing their services accrued to an abuse of British Airways' dominant position in the service of air passenger transportation. In the Judgment the GC found that a market share as low as 39,7% for the air ticket sales handled by IATA as a travel agency coordinator was enough to declare dominance, *inter alia*, by assessing the large market shares of BA as a purchaser of travel agency services and as a provider of air transport as well as comparing "the ratio between the market share held by the undertaking concerned and that of its nearest rivals".²⁶⁶ The GC appears to argue in line with the dualistic approach as it held that even though the dominance of British Airways was to be assessed in its condition as a purchaser of services,²⁶⁷ the "economic strength which BA derives from its market share is further reinforced by the world rank it occupies in terms of international scheduled passenger-kilometres flown, the extent of the range of its transport services and its hub network",²⁶⁸ all characteristics of British Airways as a seller in the downstream market and not in the upstream market as a buyer. Because of its strength in both the upstream and downstream market and, therefore, *substantial market power in both markets*, the GC concluded that:

"BA is therefore wrong to deny that it is an obligatory business partner of travel agents established in the United Kingdom and to maintain that those agents have no actual need to sell BA tickets. BA's arguments are not capable of calling into question the finding, in recital 93 of the contested decision, that BA enjoys a particularly powerful position in relation to its nearest rivals *and* the largest travel agents."²⁶⁹

This interpretation is made by recourse to the explicit language, the conjunction *and*, of the GC when it states that British Airways enjoyed substantial market power in both markets upstream and downstream.

²⁶⁴ As noted by Whish and confirmed by my research on buyer power matters, the decision represents "the first (and only) occasion on which an undertaking with a market share of less than 40 per cent has been found by the commission to be in a dominant position under Article 102.", in Whish and Bailey, 183.

²⁶⁵ C-95/04P - *British Airways v Commission*, EU:C:2007:166 E.C.R. [2007] I-02331; T-219/99 - *British Airways v Commission*, EU:T:2003:343 E.C.R. [2003] II-05917, para 211; Commission Decision relating to a proceeding under Article [102] TFEU IV/D-2/34.780 — *Virgin/British Airways* [2000] OJ L30/1, para 41.

²⁶⁶ T-219/99 - *British Airways v Commission*, EU:T:2003:343 E.C.R. [2003] II-05917, para 210.

²⁶⁷ T-219/99 - *British Airways v Commission*, EU:T:2003:343 E.C.R. [2003] II-05917, para 191.

²⁶⁸ T-219/99 - *British Airways v Commission*, EU:T:2003:343 E.C.R. [2003] II-05917, para 212.

²⁶⁹ T-219/99 - *British Airways v Commission*, EU:T:2003:343 E.C.R. [2003] II-05917, para 217 (emphasis added).

In my view, a buyer oriented interpretation of *British Airways v Commission* offers a strong and coherent reason on why the ECJ confirmed a decision where dominance was said to exist in a market share threshold that is noticeably lower than when compared to the standard dominance presumptions for seller-side cases.²⁷⁰ As suggested in this thesis and ratified by the case law and Commission's practice substantial bargaining power may arise even if the market share thresholds are relatively low. In addition, whenever a buyer – such as it was the case of British Airways with respect to travel agencies services – also possesses market power as a seller – as it was the case with respect to air passenger transport – it has dual market power, upstream and downstream fitting the hourglass shape. When an undertaking fits the hourglass shape the competitive risks posed by buyer power are increased as it not only exercises buyer power but it also is able to exercise concomitantly seller power. By looking at the Decision and the subsequent Judgments it appears to me that both the Commission and the EU judiciary were concerned with the foreclosing effect that buyer power through incentive-enhancing rebates had in the downstream market. In simpler terms: if British Airways offered conditions to its travel agents that were so attractive, the travel agents were mainly going to sell airline tickets to end consumers of British Airways and not of its competitors. By British Airways being able to control this distribution channel of sales by capturing the supply of travel agency services to airlines it was able to strengthen its dominance in the downstream market as an airline carrier.

Because of the extraordinary circumstances of this case and the lack of similar situations being decided by the EU judiciary it is difficult to conclude whether this constitutes an isolated decision or whether the case privileged other concerns, such as the exclusionary effects of rebates. Due to this and taking a conservative approach in my view in the current state of the law the correct interpretation of this considerably low market share threshold has to be restrictive and not applied to seller-side cases and neither to all buyer power cases. The 40% market share threshold should, in principle, be applied *only* to buyer power cases where the investigated undertaking also possesses substantive downstream market power. With respect to buyer power cases where the undertaking lacks market power downstream, due to the absence of guidance from the ECJ, it is difficult to argue that a 40% threshold should apply. This is derived from the fact that in the few cases dealing with abuse of a dominant purchasing position, the market shares enjoyed by the undertakings under investigation have been very large. Such is the example of *Irish Sugar v Commission* Irish Sugar was found to, inter alia, had abuse of its dominance as purchaser of water transport services by demanding its suppliers to not offer sugar transportation services to its

²⁷⁰ C-62/86 - *AKZO v Commission*, EU:C:1991:286 E.C.R. [1991] I-03359, para 60.

competitors.²⁷¹ In this case Irish Sugar enjoyed of a very large market share in the Irish market for sugar of 90% and 88% throughout the period of investigation.²⁷²

This conservative approach to a lower dominance threshold as the rule of thumb for all buyer power cases appears also to be the Commission's view when arguing that its "experience suggests that dominance is not likely if the undertaking's market share is below 40 % in the relevant market."²⁷³

This approach has been partially challenged by statutory national law provisions in Finland where the Competition Act amended in 2014 introduced a special provision establishing that in the case of supermarket retailing an undertaking with 30% market share in the downstream market and/or the upstream market is to be accounted as a *dominant undertaking*.²⁷⁴

"Dominant position in daily consumer goods trade

An undertaking or an association of undertakings with a minimum of 30 per cent market share in the Finnish daily consumer goods retail trade shall be deemed to occupy a dominant position in the Finnish daily consumer goods market. This includes *both the retail and procurement markets*."²⁷⁵

It is important remarking that this disposition is grounded on the underlying characteristics of food retailing markets in Finland (and to a large degree in Scandinavia) that shows very concentrated markets with few and very large active players (3 or 4 in most cases). Furthermore, this measure only applicable to the food retailing sector reinforces the idea that the buyer power effects of an undertaking fitting the hourglass shape model tend to be pernicious if its buyer power is abused because it has direct repercussions both upstream and downstream.

The assessment of buyer market power has also relevance for two additional scenarios. On the one hand the creation or strengthening of substantial buyer market power through concentrations

²⁷¹ Commission Decision relating to a proceeding pursuant to Article [101] TFEU IV/34.621, 35.059/F-3 — Irish Sugar plc [1997] OJ L/258, partially ratified by the GC T-228-97 - *Irish Sugar v Commission*, EU:T:1999:246 E.C.R. [1999] II-02969.

²⁷² Commission Decision relating to a proceeding pursuant to Article [101] TFEU IV/34.621, 35.059/F-3 — Irish Sugar plc [1997] OJ L/258, para 159.

²⁷³ Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7, para 14.

²⁷⁴ In accordance to Art. 3.2. of the Council Regulation (EC) No. 1/2003 on the Impementation of the Rules on Competition Laid Down in Arts [101] and [102] TFEU [2003] OJ L 1/1, Member States are mot precluded from applying "in their territory stricter national laws which prohibit or sanction unilateral conduct engaged in by undertakings".

²⁷⁵ Competition Act (No 948/2011), last ammended in 2014, Section 4a (emphasis added). For a thorough analysis of the new provision see: Mika Oinonen, 'The New 30% Rule: A Viable Solution To Detrimental Buyer Power In The Finnish Grocery Retail Sector?' 10 European Competition Journal [2014].

that may significantly impede effective competition and, on the other hand, the creation of buyer power through purchasing alliance and other type of agreements among undertakings.

Regarding concentration cases the Commission's practice, particularly in the case of food-retailing, sheds some light on what proportion of the supplier's sales is required to consider that a single undertaking is able to exercise *significant buyer power* that may lead to a significant impediment to competition and a situation of *economic dependence* for its supplier.²⁷⁶ In this context economic dependence of a supplier to a buyer does not necessarily imply that the buyer is dominant in the purchasing market. Dependency is a relative concept that describes an asymmetrical relation between two parties, whereas dominance is an objective concept that does not involve a bilateral relation.²⁷⁷

In *Carrefour/Promodes*²⁷⁸ and *Rewe/Meinl*²⁷⁹, two assessments of concentration operations in the market of food retailing, both operations were declared compatible due to the submission of commitments that palliated the competitive concerns that arose from the assessments. In the case of *Carrefour/Promodes* it was concluded that the merged undertaking, that would have 25-35% of market share in the downstream market,²⁸⁰ could exercise bargaining power if able to reach a "threat point" (*taux de «menace»*). If the buyer represented an average of 22% the suppliers' turnover, the seller would be in a dependent situation as the "loss of a customer (with that market share) would threaten the very existence of their business".²⁸¹ The Commission concluded that, when a buyer exceeds such a threshold in the turnover of one of its suppliers, the latter is found to be in a de facto situation of "economic dependence".²⁸² Importantly and a factor that may easily be overlooked is that this 22% does not represent the undertaking's market shares in the purchasing market but instead it represents the ratio of sales that a buyer signifies for a particular buyer. In practice this may imply that even a buyer with a small total purchasing market share may still have *relative* buyer power vis-à-vis a particular supplier but not *general* buyer power.

Concerning retailer thresholds Pera has suggested other indicative figures: if the shares are between 20 to 10 percent buyers have a "strong negotiating power to retailers", and below 10

²⁷⁶ The dependence doctrine is discussed at length in Section 1.4.2.3.

²⁷⁷ Pera 17.

²⁷⁸ Commission Decision COMP/M. 1684 – Carrefour/Promodes, [2000], French public version, para 52-55.

²⁷⁹ "The Commission asked producers above what proportion of turnover, with a given customer could not be switched to other sales channels without difficulty. It transpired that on average 22 % of turnover is the say, of one branded goods producer who makes 'must figure above which a customer can be replaced only at carry'/products, as Rewe/Billa and Meinl risk losing the cost of very heavy financial losses, if at all.", Commission Decision IV/M.1221 — Rewe/Meinl [1999] OJ L274/1, para 101.

²⁸⁰ Commission Decision COMP/M. 1684 – Carrefour/Promodes, [2000], para 60.

²⁸¹ Commission Decision COMP/M. 1684 – Carrefour/Promodes, [2000], para 52 (translation by the author). See also mentioning this 22% threshold as part of the "threat point" theory Ezrachi and Ioannidou [2014] 81.

²⁸² Commission Decision COMP/M. 1684 – Carrefour/Promodes, [2000], para 52 (translation by the author). See also supporting this Doyle and Inderst [2007] 213.

percent “there would not be an asymmetric situation”.²⁸³ In the UK this level of supplier’s turnover was even deemed even lower up to 8% by the extinct UK Competition Commission.²⁸⁴ This 8% ceiling appears to be quite low and, as Dobson remarks, this threshold limit was chosen without the report providing any explanation.²⁸⁵ These suggested relative low thresholds, in conjunction with other factors, are consistent with my research in the sense that they confirm that buyer power may arise with lower market shares than when compared to seller power because of the special conditions of purchasing markets. I, however, am cautious into suggesting that the Commissions’ threshold of 22% - or the other proposed alternatives -applies for all type of buyer power cases for several reasons: i) firstly, these decisions are all in connection with food retailing where the undertakings participating tend to have substantive market power both upstream and downstream market, fitting the hourglass description; ii) these Decisions have been rendered by the Commission but no binding Judgment has pronounced itself yet concerning the limits for the substantive market power to exist; iii) the sample of cases is small; since in only 2 cases this threshold has been suggested it is not very representative of a accepted practice; iv) this ratio of 22% does not represent the undertaking’s total market share in the purchasing market but just a ratio of sales-purchases between a buyer and a specific supplier; thus it is a relative measure of buyer power but not absolute; v) adopting such threshold levels regardless of the upstream and downstream market competitive circumstances may lead to erroneous results. In other words, these thresholds have to be compared with the suppliers’ own market shares and determine whether there is or not a disparity in the ratio of purchases-profit represented by a buyer to a seller.

This cautious approach has also basis on the EU case law. In *Cementbouw Handel & Industrie v Commission*, however, the GC concluded that the proportion of sales a buyer represents to an undertaking under investigation in isolation does not necessarily imply that the the buyer enjoys of countervailing buyer power – and therefore the seller is not dependent on it – even if this seller accrues alone for 20-30% of the seller’s turnover. This absence of countervailing buyer power was due to the existence of other buyers that “organised in buyer groups (... where) capable of obtaining supplies in significant volumes, towards which CVK could if necessary steer its production”.²⁸⁶ If a seller has other alternative buyers to turn to the bargaining power of its current customers is reduced and therefore there is no dependency among the parties.

Lastly, concerning purchasing agreements among buying undertakings the Commission in its Guidelines on Horizontal Co-Operation Agreements has also established a dual market share

²⁸³ Pera.

²⁸⁴ UK Competition Commission, *Supermarkets: A report on the supply of groceries from multiple stores in the United Kingdom* (2000) para 2.588 to 2.596.

²⁸⁵ Dobson 119.

²⁸⁶ T-282/02 - *Cementbouw Handel & Industrie v Commission*, EU:T:2006:64 E.C.R. [2006] II-00319, para 233.

threshold that acts as an *iuris tantum* presumption that the parties to the agreement lack of substantial market power. Unlike the previous cases, here the buyer power analysis involves not the unilateral conduct but the “pooling” of buyer power among several buyers. Also, and unlike in the case of food retailing, the market shares are considered in relation to the general markets and not the *relative* buyer power between the purchasing parties and a single supplier. If parties to the agreement have a combined market share threshold not exceeding 15% on the purchasing market as well as a combined market share not exceeding 15% on the selling market (or markets) it is unlikely that substantive buyer market power exists and also, even if it does, it is also likely that the conditions for the application of Art. 101(3) TFEU will be met.²⁸⁷ Even in the case that either one or the other market share is above 15% the Commission’s view is that this “does not automatically indicate that the joint purchasing arrangement is likely to give rise to restrictive effects on competition”;²⁸⁸ instead a case-by-case assessment ought to be made.²⁸⁹

Recapitulating, the case law and Commission’ practice reveals that in buyer power cases the setting of market share threshold is in line with dualistic market power assessment. Also, it confirms that substantial buyer power may arise even if the market share is relatively low in comparison to seller-side cases (i.e. below 30% of the sales of its supplier).²⁹⁰ In the particular case of dominance the case law indicates that a buying undertaking may abuse of its dominance as a buyer if its market share threshold is above 39,7%. As I discussed, I do not think this conclusion should be the same for seller side cases and that is why the interpretation of *British Airways v Commission* must be restrictive and not extrapolated to seller-side cases. Finally, and as remarked by Doyle and Inderst, when determining the *prima facie* existence of buyer power through market shares thresholds “*this should not be done in isolation from the potential theory of harm that would be (subsequently) applied*”;²⁹¹ otherwise the use of isolated thresholds may lead to incorrect results.

²⁸⁷ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1, para 208. See also suggesting the adoption of a 15% threshold for the safeguarding of buyer alliances in US Antitrust Carstensen, ‘Buyer Cartels Versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy’ [2010] 44.

²⁸⁸ Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements [2011] OJ C11/1, para 209.

²⁸⁹ In contrast, in US Antitrust, with respect to joint purchasing arrangements among health care providers, it is suggested adopting a much higher threshold when stating that the “Agencies will not challenge, absent extraordinary circumstances, any joint purchasing arrangement among health care providers where two conditions are present: (1) the purchases account for less than 35 percent of the total sales of the purchased product or service in the relevant market; and (2) the cost of the products and services purchased jointly accounts for less than 20 percent of the total revenues from all products or services sold by each competing participant in the joint purchasing arrangement”, US Department of Justice and Federal Trade Commission, *Statements of Antitrust Enforcement Policy in Health Care* (1996); For a critical view of this threshold see: Carstensen, ‘Buyer Cartels Versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy’ [2010].

²⁹⁰ Pera 14.

²⁹¹ Doyle and Inderst [2007] 215 (italics in original).

Market share valuation

Once market shares have been identified and the preliminary thresholds assessment has been done, the decision maker ought to interpret them. As recognized by the ECJ in *Hoffmann-La Roche v Commission* the valuation of market shares is one of the most importance factors when assessing the market power of an undertaking.²⁹² The valuation of market shares is not a constant factor; it ought to be made in a case-by-case basis and its importance varies from market to market according to the structure of these as well as whether they have been held for some time by the same undertaking.²⁹³ Echoing this, the Commission has stated that the valuation of market shares shall be made “in the light of the *relevant market conditions*, and in particular of the *dynamics of the market* and of the extent to which products are differentiated”.²⁹⁴

For buyer power cases this involves that assessment of market shares ought to be in the conjunction with the specific buying market dynamics and conditions to fully capture buyer power effects in the upstream and downstream markets and as discussed *supra*.²⁹⁵ Hence, I advocate for a case-by-case approach that factors in the sources of buyer market power and the market conditions and not the adoption of hard-fast rules based on pure thresholds considerations. Also, I suggest that the valuation should compare the buyer’s market shares with its competitors and suppliers in the upstream and downstream markets,²⁹⁶ as a buying undertaking is more likely to be dominant if its suppliers and competitors are relatively weak.²⁹⁷ By doing so and contrasting welfare effects in both markets a full picture of the anti-competitiveness of the behavior is seen. Additionally, I propose that the valuation of market shares ought to take into account the relative selling power of suppliers in the upstream market. Market shares and supplier side concentration ought to be considered. If suppliers are relatively powerless there is further evidence of the existence of buyer power.

²⁹² C-85/76 - *Hoffmann-La Roche v Commission*, EU:C:1979:36 E.C.R. [1979 00461], para 39 *in fine*.

²⁹³ C-85/76 - *Hoffmann-La Roche v Commission*, EU:C:1979:36 E.C.R. [1979 00461], para 40-41. See also in this same line Association, *Market Power Handbook: Competition Law and Economic Foundations* 104 to 105.

²⁹⁴ Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7, para 14 (emphasis added). See also the work of Chen when stating that “A large retailer may not be able to obtain below-normal prices from a supplier if it has to compete aggressively against other retailers for the suppliers products. The key to the existence of buyer power, therefore, is not the relative size, but whether there is vigorous competition, either actual or potential, for the supplier's products”, in Chen [2007] 30.

²⁹⁵ Also of this opinion is Kokkoris when states that: “Buyer concentration can provide an indication of the buyer power, but cannot be definitive. The structure of the buyer and the seller markets must also be taken into account”, in Kokkoris [2006] 148.

²⁹⁶ European Commission, DG Competition, Discussion paper on the application of Article 82 of the Treaty to exclusionary abuses, para 31. See the opinion of Monti who openly criticizes the interpretation of the Commission of the case law by narrowing exceptional circumstances to the market shares of rivals in Monti [2006] 49.

²⁹⁷ Office of Fair Trading [2004] 7.

1.5.2.2. *Market concentration*

Another widely used market power assessment tool are indexes of market concentration. They offer information concerning the relative size and strength of the market participants helping determining the extent of an undertaking's market power.²⁹⁸ Market concentration is directly linked to market shares as it is calculated by the sum of the squares of the market share of the undertakings that purchase or sell a good in the relevant market, thus giving proportionately greater weight to the larger market share,²⁹⁹ in accordance to the Herfindahl-Hirschman Index ("HHI").³⁰⁰ The HHI is obtained by summing the squares of the individual market shares of all firms included in the formula and expressed as $HHI = \sum_{i=1}^n S_i^2$.

It measures how concentrated a market is, which is particularly useful when assessing the compatibility of a proposed concentration.³⁰¹ Market concentration is usually but not exclusively employed in merger cases to measure market concentration because it allows to determine the likelihood of coordinated (tacitly or explicitly) behavior.³⁰² The rationale is that as more concentrated the market the easier will be for firms to coordinate their behavior and reap monopoly/monopsony profits.³⁰³ In dominance cases, on the other hand, a very high market concentration may indicate the existence of a dominant position or the possibility of a collective dominant position.³⁰⁴

²⁹⁸ Hovenkamp, 518; Niels, Jenkins and Kavanagh, 128.

²⁹⁹ Janusz A. Ordover and Robert D. Willig, 'The 1982 Department of Justice Merger Guidelines: An Economic Assessment' 71 California Law Review [1983]; U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines [2010], para 18.

³⁰⁰ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, para 16. See also: Gavil, Kovacic and Baker, 500 to 501.

³⁰¹ Different market concentrations ranges have been proposed by NCAs for concentration assessment using the HHI index. For example the US HMG consider a markets unconcentrated when the HHI is below 1 500, the market will be moderately concentrated markets if the HHI is between 1 500 and 2 500, and lastly the market will be highly concentrated markets if the HHI is above 2 500.³⁰¹ The equivalent thresholds are slightly lower in the EU: i) concentrations below 1,000 HHI do not merit extensive analysis (unconcentrated markets); ii) it is unlikely to identify horizontal competition concerns in a merger with a post-merger HHI between 1 000 and 2 000 and a delta below 250, or a merger with a post-merger HHI above 2 000 and a delta below 150 (moderately concentrated markets).³⁰¹ Despite that neither the Notice on market definition nor the Guidance Notice on Article 102 make explicit references to market concentration this parameter is used in the analysis of dominance. See also: Cook and Kerse, 236.

³⁰² Oinonen, 158; also this is the opinion of Kokkoris and Shelansky regarding buyer's markets in Kokkoris and Shelanski, 427.

³⁰³ Oinonen, 158 to 159.

³⁰⁴ The topic of collective dominance and its regulation by means of either or Art. 102 TFEU or the EU Merger Control Regulation is one of the most controversial aspects of EU competition and plenty of literature abounds in this field of the law. For further reading see, inter alia: Barry J. Rodger, 'The Oligopoly Problem and the Concept of Collective Dominance: EC Developments in the Light of U.S. Trends in Antitrust Law and Policy' 2 Columbia Journal of European Law [1995-1996]; Giorgio Monti, 'The Scope of Collective Dominance under Article 82 EC' 38 Common Market Law Review [2001]; Warren S Grimes, 'The Sherman Act's Unintended Bias Against Lilliputians: Small Players' Collective Action as a Counter to Relational Market Power' 69 Antitrust Law Journal [2001]; Sigrid

However, market concentration does not indicate whether the market is competitive or not,³⁰⁵ even if concentration levels are high, as noted by Hyman and Kovacic.³⁰⁶ Non-coordinated oligopsonist markets may be very competitive if the leading firms are of equivalent sizes and as efficient.³⁰⁷ However, when one firm is much larger than the rest, this will be likely to be conducive to “price leadership” as noted by Hovenkamp.³⁰⁸ For buyer power cases, however, it seems unlikely that a phenomenon such as purchasing price leadership may take place as this would imply that the large buyer must pay a lower price for the input. If it does so, then the smaller buyers by paying slightly more will deprive the larger buyer of all input.

Concerning buyer power cases market concentration also plays an important role as confirmed by the GC in *Cementbouw Handel & Industrie v Commission*, where it is stated that “degree of concentration of buyers on the market means that their limited number may be capable of reinforcing their bargaining power vis-à-vis the supplier”.³⁰⁹ Lastly, when evaluating market concentration in buyer power cases it has to be taken into account that even in relatively unconcentrated markets it may be possible to exercise bargaining power (but arguably not monopsony power), as discussed above.

1.5.2.3. *Unavoidable trading partner and dependency*

One of the most important buyer market power measurement tools of are the doctrines of unavoidable trading partner and dependency. By and large, if a buyer is a necessary party to make business with the suppliers will be in a situation where their future and profitability depends on maintaining the buyer as a client, even if the competitive conditions are not particularly profitable. In the absence of a contractual relation to that buyer the supplier will have to leave the market in the long run. In this section I discuss these two assessment tools from a

Stroux, ‘Collective dominance under the Merger Regulation: a serious evidentiary reprimand for the Commission’ 27 *European Law Review* [2002]; Frances Dehmers, ‘Collective dominance under EC merger control - after Airtours and the introduction of unilateral effects is there still a future for collective dominance?’ 26 *European Competition Law Review* [2005]; Simon. Dethmers Baxter, Frances, ‘Collective dominance under EC merger control - after Airtours and the introduction of unilateral effects is there still a future for collective dominance?’ 27 *European Competition Law Review* [2006]; Ronny Gjendemsjø, *Oligopolproblemet: om anvendelsen av TFEU artikkel 101 og 102 på koordinerte priser i et oligopol* (Universitetet i Bergen 2011); Elhauge and Geradin, 960 to 981; Renato Nazzini, *The foundations of European Union competition law: the objective and principles of article 102* (Oxford University Press 2011) 359 to 388; Whish and Bailey, 571 to 584.

³⁰⁵ Bishop and Walker, 70.

³⁰⁶ Hyman and Kovacic [2004] 26

³⁰⁷ Hovenkamp, 518. See also the criticism to the value of market concentration measures in Gavil, Kovacic and Baker, 505 to 506.

³⁰⁸ Hovenkamp’s proposition is made with a selling undertaking in mind, rather than a buyer undertaking in Hovenkamp, 518.

³⁰⁹ T-282/02 - *Cementbouw Handel & Industrie v Commission*, EU:T:2006:64 E.C.R. [2006] II-00319, para 232.

buyer-oriented perspective.³¹⁰ The discussions presented allow for the understanding of the last two measurement tools for buyer power: alternative supply sources and gate-keeping, as they are intrinsically related to the doctrines here covered.

i. Unavoidable trading partner

The doctrine of an unavoidable trading partner established by the ECJ in *Hoffmann-La Roche v Commission* constitutes another important factor in buyer power assessment.³¹¹ The court defined that an undertaking is an unavoidable trading partner when it “has a very large market share and has held it for some time”.³¹² When an undertaking is an unavoidable trading partner, at least from a seller-perspective, customers are forced to obtain at least part of their demand from the dominant undertaking. This forced grants the undertaking a “non-contestable” share against which competitors are incapable of “compete for the full supply of a customer, but only for the portion of the demand exceeding the non-contestable share” as recently confirmed by the GC in *Intel v Commission*;³¹³ this is “the portion of a customer’s requirements which can realistically be switched to an undertaking’s competitor in a dominant position in any given period”. If an undertaking is an unavoidable trading partner this grants it the freedom of action that is akin to a dominant undertaking.³¹⁴ For Advocate General Kokott one of the assessment tools to determine if an undertaking is an unavoidable trading partner is a market shares comparison of said undertaking with other market participants either in the upstream and downstream market,³¹⁵ an opinion which I concur with concerning the dualistic comparison. In my view, the unavoidable trading partner doctrine, in contrast with the dependency doctrine, is an *erga omnes* privileged

³¹⁰ Cf with the view that “(a)t most, the consideration that a company may be an “unavoidable trading partner” will assist the Commission in identifying the relevant parameters – outside market shares – that are relevant for a finding of dominance in the particular industry under examination (e.g., barriers to entry linked to a must stock brand, barriers to entry raised by the control of essential assets, etc.), i.e. the factors that make customers dependent upon the allegedly dominant player.”, Damien Geradin and others, *The Concept of Dominance in EC Competition Law* (College of Europe 2005) 13 to 14.

³¹¹ C-85-76 - *Hoffmann-La Roche v Commission*, EU:C:1979:36, E.C.R. [1979] 00461, para 41. Ratified more recently in T-286/09 - *Intel v Commission*, EU:T:2014:547 [2014], para 91-93

³¹² C-395/96 P - *Compagnie Maritime Belge Transports and Others v Commission*, EU:C:2000:132 E.C.R. [2000] I-01365, para 132.

³¹³ T-286/09 - *Intel v Commission*, EU:T:2014:547 [2014], para 92.

³¹⁴ “Very large market shares are in themselves, and save in exceptional circumstances, evidence of the existence of a dominant position. An undertaking which has a very large market share and holds it for some time, by means of the volume of production and the scale of the supply which it stands for – without those having much smaller market shares being able to meet rapidly the demand from those who would like to break away from the undertaking which has the largest market share – is by virtue of that share in a position of strength which makes it an unavoidable trading partner and which, because of this alone, secures for it, at the very least during relatively long periods, that freedom of action which is the special feature of a dominant position”, T-66/01- *Imperial Chemical Industries v Commission*, EU:T:2010:255 E.C.R. [2010] II-02631, para 265. An identical and previous formulation is found in T-57/01 - *Solvay v Commission*, EU:T:2009:519 E.C.R. [2009] II-04621, para 277.

³¹⁵ “Because of its much higher market share, a dominant undertaking is normally, so far as **other market participants** are concerned, an unavoidable trading partner.”, Opinion of Advocate General Kokott in C-95/04P - *British Airways v Commission*, EU:C:2006:133 E.C.R. [2007] I-02331, para 52.

position. In other words, when an undertaking is an unavoidable trading partner it is vis-à-vis the generality of its suppliers and customers. It is not a relative but rather an objective concept.

From a buyer perspective the test consist in determining if suppliers are dependent to the buyer because it constitutes an unavoidable trading partner,³¹⁶ which implies that suppliers are willing to concede better terms to the buyer in order to retain the opportunity to sell to it because of its significance to the supplier.³¹⁷ Such a position of an unavoidable trading partner might be earned as result of advertising, marketing and/or product differentiation or having a “must stock” product.³¹⁸ If a buying undertaking is an unavoidable trading partner its suppliers will be in addition dependent to it.³¹⁹ The reverse also holds true, if the supplier is the unavoidable trading partner, then the buyer loses its relative bargaining power. This was the case in *GE/Honeywell* where the Commission considered that the exercising of buyer power vis-à-vis a dominant seller is limited by the imbalance in the commercial relationship because GE was an unavoidable trading partner.³²⁰ The same was decided in *Syniverse/Mach* where the merged entity would become a *unavoidable trading partner* making “unlikely that customers can resist its attempts to increase prices or decrease quality in NRTRDE”,³²¹ making the exercise of countervailing buyer power insufficient. The merger was ultimately declared compatible because of the divestiture of essentially the entirety of Mach’s DC and NRTRDE businesses.

ii. Dependency

Dependency is another assessment tool to determine if a buyer enjoys substantial buyer power vis-à-vis a particular supplier. Consequently, the state of dependency is a *relative* concept as a supplier may or not be dependent regarding a buyer (or group of joint buyers) but not necessarily to others.³²² Dependency may arise between buyers and sellers and sellers and buyers as

³¹⁶ Commission Decision relating to a proceeding under Article [102] TFEU IV/D-2/34.780 — *Virgin/British Airways* [2000] OJ L30/1, para 32.

³¹⁷ Office of Fair Trading, *Assessment of market power: Understanding competition law* (2004) 24. See also: Doyle and Inderst [2007] 213; International, Competition and Network, *Unilateral Conduct Workbook Chapter 3: Assessment Of Dominance* (2011) para 106.

³¹⁸ Commission Decision of relating to a proceeding under Article [102] TFEU COMP/C-3 /37.990 – *Intel* [2009] OJ C 227/13.

³¹⁹ Also considering that an unavoidable trading partner creates vertical dependency see: Jan Bernd Nordemann, ‘Buying power and sophisticated buyers in merger control law: the need for a more sophisticated approach’ 16 *European Competition Law Review* [1995]; see in respect to merger cases Ulrich Schwalbe and Daniel Zimmer, *Law and economics in European merger control* (Oxford University Press 2009) 154.

³²⁰ Commission Decision declaring a concentration to be incompatible with the common market and the EEA Agreement Case COMP/M.2220 - *General Electric/Honeywell*, para 227.

³²¹ Commission Decision of 29 May 2013 declaring a concentration compatible with the internal market and the functioning of the EEA Agreement (Case COMP/M.6690 — *Syniverse/Mach*) (O.J. 1.3.2014 C60/7), para 54.

³²² Also supporting the notion that dependence is a relative concept in opposition to dominance see: Bundeskartellamt 6; using the term “relative economic dependency” see: Oinonen [2014].

illustrated in *IMS Health*³²³ and *JCI/FIAMM* where buyers were dependant of the supply of batteries but the suppliers were not dependent of these purchases as this sub-market accounted only for a third of the total turnover of the battery business.³²⁴ However, dependent buyers are less frequent because in buying markets the supplier is generally much more dependent on its customers than vice versa.³²⁵ Also, dependency may exist even if an undertaking is not dominant and/or not an unavoidable trading partner, as confirmed in *Rewe/Meinl*³²⁶ and *Carrefour/Promodes*³²⁷. Additionally, and as illustrated by *Kesko/Tuko*, dependency is also relative in the sense that its degree varies from relation to relation.³²⁸ Particularly in relation to bargaining power, Galbraith considered dependency as the most important tactic to exercise it allows buying undertakings to “the seller in a state of uncertainty as to the intentions of a buyer who is indispensable to him”.³²⁹ An example may illustrate the concept of dependency: if a provider of sugar cane in a Member State sells 85% of its sugar production to a single processing undertaking with very large market shares as a seller in the downstream market, the fact that this buyer threatens to switch to alternative suppliers or simply stop buying sugar may lead to the supplier’s financial failure.³³⁰

The intuition behind the dependency doctrine is that the larger the proportion a buyer represents for the total sales of a seller (and in accordance its profitability) the more powerful the buyer becomes.³³¹ Dependency measures the relative damage that each party will suffer in case there is

³²³ “(...) account must be taken of the fact that a high level of participation by the pharmaceutical laboratories in the improvement of the 1 860 brick structure protected by copyright, on the supposition that it is proven, *has created a dependency by users* in regard to that structure, particularly at a technical level. In such circumstances, it is likely that those laboratories would have to make exceptional organisational and financial efforts in order to acquire the studies on regional sales of pharmaceutical products presented on the basis of a structure other than that protected by the intellectual property right. The supplier of that alternative structure might therefore be obliged to offer terms which are such as to rule out any economic viability of business on a scale comparable to that of the undertaking which controls the protected structure”, C-418/01 - *IMS Health*, EU:C:2004:257 E.C.R. [2004] I-05039, para 29.

³²⁴ Commission Decision of 10 May 2007 declaring a concentration compatible with the common market and the functioning of the EEA Agreement (Case COMP/M.4381 — *JCI/FIAMM*) non-summarized version, para 407-413. This degree of dependency was satisfied in the Commission’s view for example by recourse to the threats made by one of the parties to FIAT, one of its battery buyers, of stop deliveries if the higher purchasing prices were not accepted

³²⁵ Dobson [2004-2005] 531.

³²⁶ Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, para 17.

³²⁷ Commission Decision COMP/M. 1684 – *Carrefour/Promodes*, [2000], French public version, para 52-55.

³²⁸ Commission Decision IV/M.784 -*Kesko/Tuko*, unabridged version, para 150. See also: Ezrachi and Ioannidou [2014] 79.

³²⁹ Galbraith, 108.

³³⁰ This example is loosely model in the case: C-497-99 P - *Irish Sugar v Commission*, EU:C:2001:393 E.C.R. [2001] I-05333. Also stressing that loosing a contract may imply the loss of financial viability, Paul W. Dobson and Roman Inderst, ‘The Waterbed Effect: Where Buying and Selling Power Come Together’ 331 *Wisconsin Law Review* [2008].

³³¹ Carstensen, ‘Buyer Cartels Versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy’ [2010] 30.

failure to reach an agreement.³³² As expressed in *KE KELIT v Commission* “the bonds of economic dependence existing between participants in an agreement is (sic) liable to affect their freedom of initiative and decision, the existence of those bonds does not make it impossible to refuse to consent to the agreement which is proposed to them”.³³³ The more dependent a party is to another, the more it will be willing to cede part of its profits in order to secure the contract.³³⁴ For this reason, the financial capacity of both undertakings plays a role that ought to be assessed by competition authorities.³³⁵

If a supplier is in a state of dependency from its buyer the latter enjoys of relative substantive buyer power vis-à-vis this supplier, as it has been recognized by the EU judiciary, the Commission and even national law of a Member State, as it is the case of the Latvian Competition Law that includes a special provision for the assessment of dominance in supermarket retailing:

“(2) A market participant or several market participants are in a dominant position in retail trade if, *considering their buying power* for a sufficient period of time and the *suppliers’ dependency in the relevant market*, they have the capacity of directly or indirectly applying or imposing unfair and unjustified provisions, conditions or payments upon suppliers and may hinder, restrict or distort competition in any relevant market in the territory of Latvia. Any market participant who is in a dominant position in retail trade are (sic) prohibited from abusing such dominant position in the territory of Latvia.”³³⁶

Other Member States, like Germany or Italy, punish the abuse of economic dependence not by competition law but by unfair competition laws. In Italy, for example, economic dependence is defined “as the situation where an undertaking is able to determine an excessive imbalance of rights and obligations in its dealings with another undertaking.”³³⁷

To assess the degree of dependency of suppliers vis-à-vis its buyers several factors have to be taken into account. For example, the proportion of sales that the buyer represents for the

³³² Dobson [2004-2005] 533.

³³³ T-17/99 - *KE KELIT v Commission*, EU:T:2002:73 E.C.R. [2002] II-01647, para 48. See discussing dependence between a parent company and its subsidiary: C-32/78 - *BMW Belgium v Commission*, EU:C:1979:191 E.C.R. [1979] 02435, para 36. Also clarifying that dependency is not a valid argument to claim that an undertaking was to be involved in a cartel see: T-362/06 - *Ballast Nedam Infra v Commission*, EU:T:2012:492 [2012], para 104.

³³⁴ Similarly, see: Alla Pozdnakova, ‘Buyer power in the retail trading sector: evolving Latvian regulation’ 30 *European Competition Law Review* [2009].

³³⁵ Kokkoris and Day [2009] 180.

³³⁶ Latvian Competition Law, lastly amended in 2009, Section 13(2), electronically available in its English version at: <http://www.kp.gov.lv/en/abuse-of-dominant-position>.

³³⁷ Buttà and Pezzoli [2014] 171; Art. 62 of law no. 27/2012.

supplier,³³⁸ entering into agreements for exclusive supply, charging structures that are not obviously related to the cost structure of the goods specified,³³⁹ the supplier's adjusting its production to meet the specific demands of a customer,³⁴⁰ if additional sources of supply are eliminated,³⁴¹ the supplier enjoys well-known brands or "must stock" products as remarked in *Nestlé/Perrier*,³⁴² the contractual relation length as stressed in *Enso/Stora*,³⁴³ or when the buyer is a necessary trading partner due to its privileged position upstream and downstream, as discussed in *Decision of Virgin/British Airways* and ratified by the GC.³⁴⁴

It might also occur that due to particular circumstances of the case both parties are dependent on each other in a state of "mutual interdependence". For instance, in *Enso/Stora* the Commission found a quite symmetrical (and unusual) market situation upstream and downstream that created a relation of "mutual interdependence" between the merging entities and its largest purchaser.³⁴⁵ The mutual dependency was caused by the long term relationship, and unlikelihood of switching commercial parties. Because of this mutual dependency neutralizing each other's market power the Commission found that countervailing buyer power was sufficient as to clear the merger. The issue of "mutual interdependence" was later on unsuccessfully raised in *Imperial Chemical v Commission* as allegedly it was created between Imperial Chemical and its customers by a perception of a community of shared interests.³⁴⁶ The interdependence was assessed by comparing the market shares and market dynamics between Imperial Chemical and its suppliers. The GC dismissed the countervailing buyer power argument³⁴⁷ based on the fact that the applicant did not support with evidence the assertions concerning the existence of countervailing

³³⁸ T-282/02 - *Cementbouw Handel & Industrie v Commission*, EU:T:2006:64 E.C.R. [2006] II-00319, para 233; Doyle and Inderst [2007] 213; OECD, *Policy Roundtables: Monopsony and Buyer Power* 40; Carstensen, 'Buyer Cartels Versus Buying Groups: Legal Distinctions, Competitive Realities, and Antitrust Policy' [2010] 30.

³³⁹ Dobson and others [2000] 19; Kokkoris and Day [2009] 179.

³⁴⁰ Trading, *The competitive effects of buyer groups* para 7.6.

³⁴¹ Commission Decision relating to a proceeding under Council Regulation (EEC) No 4064/89 IV/M. 190 — *Nestlé/Perrier* [1992] OJ L 356/1, para 89.

³⁴² Commission Decision relating to a proceeding under Council Regulation (EEC) No 4064/89 IV/M. 190 — *Nestlé/Perrier* [1992] OJ L 356/1, para 83.

³⁴³ Decision 1999/641/EC declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement IV/M.1225 - *Enso/Stora* [1999] OJ L 254, p. 9, where it was found that Enso's trading partnership with a supplier had lasted for more than 40 years.

³⁴⁴ Commission Decision relating to a proceeding under Article [102] TFEU IV/D-2/34.780 — *Virgin/British Airways* [2000] OJ L30/1, para 32 and 47; "It necessarily follows that those agents substantially depend on the income they receive from BA in consideration for their air travel agency services", T-219/99 - *British Airways v Commission*, EU:T:2003:343 E.C.R. [2003] II-05917, para 216.

³⁴⁵ Decision 1999/641/EC declaring a concentration to be compatible with the common market and the functioning of the EEA Agreement IV/M.1225 - *Enso/Stora* [1999] OJ L 254.

³⁴⁶ Interdependence between oligopsonist competitors was a central issue in the assessment of the Airtours concentration by the GC in T-342/99 - *Airtours v Commission*, EU:T:2002:146 E.C.R. [2002] II-02585; see also C-68/94 - *France and Société commerciale des potasses and de l'azote and Entreprise minière and chimique v Commission* (Kali und Salz), EU:C:1998:148, E.C.R. [1998] I-01375.

³⁴⁷ T-66/01- *Imperial Chemical Industries v Commission*, EU:T:2010:255 E.C.R. [2010] II-02631, para 276-277.

buyer power and it did not show that its customers were “able to counterbalance its market power”.³⁴⁸ Thus, there was no interdependency, but rather dependency from the buyers to the seller.

iii. Unavoidable trading partner and dependence

The case law in buyer power reflects that whenever an undertaking is an unavoidable purchasing trading partner it is very likely (if not necessary) for its customers to be in a dependent situation. For this reason, buyer power cases often involve the discussion of whether suppliers of a dominant buyer are concomitantly in a dependent situation. The outcome appears to suggest that this interpretation is accurate.

In *Irish Sugar v Commission*, discussing the existence of countervailing buyer power, the Commission found that Irish Sugar’s suppliers were dependent of it because Irish Sugar – a dominant undertaking - acted as necessary trading partner for the sugar market in Ireland due to being the sole processor of sugar beet in Ireland and Northern Ireland.³⁴⁹ Its customers were dependent because of the reduced volume of alternative supply sources as a consequence of the anticompetitive tactics employed by Irish Sugar.³⁵⁰ The Commission found the lack of alternative supplies as the dependence source enhanced by other factors such as: i) the high prices to be paid for transportation of sugar overseas; ii) the relatively small size of the Irish market that made difficult for sugar producers to obtain a satisfactory return of their investment, and iii) that even if relocation of supply was possible in the long term this does not rule out the reliance on a supplier.³⁵¹ In appeal, the GC assessed the dependency of weaker buyers when evaluating if there was sufficient countervailing buyer power neutralizing the dominance of Irish Sugar. The GC dismissed the plea as it considered that Irish Sugar failed to prove the presence of buyer power that was “capable of affecting the dominant position of the applicant”,³⁵² and that its “other customers, representing ...% of its sales volume, did not have such commercial strength”.³⁵³ These smaller customers were said to be in a dependent situation and because of this they will be theoretically forced to pay (substantially) higher prices to compensate for the reduced profits.

In the Commission *Decision of Virgin/British Airways* the relation between mandatory trading partner and dependence was also debated. It was stressed that travel agents were in a dependent

³⁴⁸ T-66/01- *Imperial Chemical Industries v Commission*, EU:T:2010:255 E.C.R. [2010] II-02631, para 277.

³⁴⁹ Commission Decision relating to a proceeding pursuant to Article [101] TFEU IV/34.621, 35.059/F-3 — *Irish Sugar plc* [1997] OJ L/258, para 17.

³⁵⁰ Commission Decision relating to a proceeding pursuant to Article [101] TFEU IV/34.621, 35.059/F-3 — *Irish Sugar plc* [1997] OJ L/258, para 107.

³⁵¹ Commission Decision relating to a proceeding pursuant to Article [101] TFEU IV/34.621, 35.059/F-3 — *Irish Sugar plc* [1997] OJ L/258, para 107.

³⁵² T-228-97 - *Irish Sugar v Commission*, EU:T:1999:246 E.C.R. [1999] II-02969, para 97.

³⁵³ T-228-97 - *Irish Sugar v Commission*, EU:T:1999:246 E.C.R. [1999] II-02969, para 97.

situation³⁵⁴ from large airlines as these constituted an almost necessary trading partner because a large portion of its revenue inevitably comes selling of airline tickets and because “it is an *obligatory trading partner* for travel agents wishing to offer a full service to their customers”.³⁵⁵ This finding was confirmed by the GC as it was concluded that “BA is therefore wrong to deny that it is an obligatory business partner of travel agents established in the United Kingdom (... and that...) that BA enjoys a particularly powerful position in relation to its nearest rivals and the largest travel agents”.³⁵⁶

1.5.2.4. Gate-keeping

Closely related to the doctrine of unavoidable trading partnership an undertaking may also see its buyer power enhanced when it acts as a gate-keeper by controlling access to the downstream market.³⁵⁷ A gate-keeper position will be held when the buyer possesses a privileged position for the distribution of goods or services in the upstream or downstream markets. As expressed by the US Federal Trade Commission “a retailer is so important a part of the retail market that its refusal to carry a product will, by itself, make it too costly for the supplier to effectively enter. The supplier may be held below minimum efficient scale in manufacturing, or may be unable to advertise efficiently in the mass media. In those circumstances the buyer stands as a gatekeeper to the retail marketplace.”³⁵⁸

For a buyer to be a gate-keeper it must possess downstream market, as noted by the OECD.³⁵⁹ If in addition it enjoys upstream market power as a buyer, then it fits my hourglass shape proposal. The US Federal Trade Commission suggests that gate-keeping power is a different type of buyer power than monopsony power and buyers without monopsony power. In contrast, in my view, the nature of gate-keeping (if its either a monopsony or bargaining power effect) will depend on the behavior.³⁶⁰

³⁵⁴ The dependence and/or mutual dependence concept will be explored further.

³⁵⁵ Commission Decision relating to a proceeding under Article [102] TFEU IV/D-2/34.780 — *Virgin/British Airways* [2000] OJ L30/1, para 32 and 47 (emphasis added).

³⁵⁶ T-219/99 - *British Airways v Commission*, EU:T:2003:343 E.C.R. [2003] II-05917, para 217.

³⁵⁷ Warren S Grimes, ‘Buyer Power and Retail Gatekeeper Power: Protecting Competition and The Atomistic Seller’ 72 *Antitrust Law Journal* [2004-2005]; Doyle and Inderst [2007] 213; Dobson and Inderst [2008] 340; Pozdnakova [2009] 388. Undertakings may also be gatekeepers as sellers, particularly if they have the control of IP rights as confirmed in Commission Decision declaring a concentration to be compatible with the common market and the EEA Agreement Case No COMP/M.1845 – *AOL/Time Warner*, para 25.

³⁵⁸ Federal Trade Commission, *Report on the Federal Trade Commission Workshop on Slotting Allowances and Other Marketing Practices in the Grocery Industry* (2001) 58.

³⁵⁹ OECD, *Policy Roundtables: Monopsony and Buyer Power* 22.

³⁶⁰ This also appears to be the view of Grimes who argues that “there seems no fundamental or conceptual difference between these two variants of retailer power, nor does there seem a clear dividing line between them. The distinction seems to be based on the degree of power the retailer possesses and the severity of the consequences that ensue when

Additionally, and in line with the proposed dual approach, the hourglass shape, if the undertaking acts as a gate-keeper the analysis of market power downstream is even more important than its market power upstream as a buyer because of the effects on aggregated consumer welfare.³⁶¹

Gate-keeping has been subject of scrutiny in several instances by the Commission, particularly for retailing industries.³⁶² In *Procter & Gamble/Gillette* it was decided that powerful buyers that control access to the end consumer “perform an important ‘gatekeeper’ function for suppliers since they serve as a ‘one-stop-shop’ for the parties’ products.”³⁶³ If a retailer refused to carry a brand of the parties, the brand would risk disappearing from the customers’ awareness.”³⁶⁴ If buyer acts as a gate-keeper, then the suppliers will be constrained not to lose this customer to avoid incurring significant losses of its product in the end market. Gate-keeping is also notably present in retailing supermarkets as buyers act for suppliers also as goods distributors, as discussed in *Kesko/Tuko*. The Commission found that this merger was incompatible with the common market, among other reasons, because of the “gate-keeper effect”.³⁶⁵ For suppliers it was necessary achieving an agreement with the proposed party as the only way to guarantee shelf space in retail outlets representing at least 55 % of the Finnish market,³⁶⁶ and as also remarked by other commentators.³⁶⁷ Because of this factor and the need of securing a contract it was perceived that suppliers would be in a position that could have been abused by the proposed entity. The fact that the proposed concentration would create or reinforce a gate-keeping position was also seen as leading to the possibility of a “spiral effect”.³⁶⁸ Ezrachi and Ioannidou argue that the spiral effect was explained by the Commission’s concern that the merged party would have been able to obtain lower purchasing prices than its competitors allowing them to drive them out of the market and raise barriers to entry.³⁶⁹ Lastly, in *Unilever/Sara Lee Body Care* the Commission analyzed and limited the effect of the interaction between food and cosmetic product retailers (supermarkets and drugstores) and their position in the downstream market as gate-keepers.³⁷⁰

it is exercised.”, in Grimes, ‘Buyer Power and Retail Gatekeeper Power: Protecting Competition and The Atomistic Seller’ [2004-2005] 578 footnote 45.

³⁶¹ Office of Fair Trading, *The competitive effects of buyer groups* para 1.21; OECD, *Policy Roundtables: Monopsony and Buyer Power* 42.

³⁶² See also raising the issue of buyer power in retailing industries: Alastair Gorrie, ‘Competition between branded and private label goods. Do competition concerns arise when a customer is also a competitor?’ 27 *European Competition Law Review* [2006]

³⁶³ Also stressing the distribution function played by gate-keeper buyers see: Louis Vogel, ‘Competition law and buying power: the case for a new approach in Europe’ 19 *European Competition Law Review* [1998].

³⁶⁴ COMP/M.3732 - PROCTER & GAMBLE / GILLETTE, 15.07.2005, public version, para 125.

³⁶⁵ Commission Decision IV/M.784 -*Kesko/Tuko*, unabridged version, para 133.

³⁶⁶ Commission Decision IV/M.784 -*Kesko/Tuko*, unabridged version, para 133.

³⁶⁷ Ezrachi and Ioannidou [2014] 79

³⁶⁸ Commission Decision IV/M.784 -*Kesko/Tuko*, unabridged version, para 153; *ibid.*.

³⁶⁹ *Ibid* 79.

³⁷⁰ Commission Decision of 17 November 2010 declaring a concentration compatible with the internal market and the functioning of the EEA Agreement (Case COMP/M.5658 — Unilever/Sara Lee Body Care).

The merging parties argued that the operation would not lead to a price increase due to the countervailing buyer power of its customers that acted not only as buyers but also controlled market access and competitors supplying private label products. In the role of pure purchasers, these buyers are mainly retail stores (supermarkets and drugstores) that are able to exercise countervailing buyer power by threatening to *delist* the supplier's secondary brand, refusal to stock new variants of the leading brand or reducing the number of stock keeping units.³⁷¹ The Commission rejected these arguments and found that in the post-merger structure the bargaining power of customers of the merged entity would not be sufficient to mitigate the likelihood of price increases but ultimately found the commitments offered sufficient to conclude that the proposed concentration will not significantly impede effective competition in the internal market or in a substantial part of it.³⁷²

From the case law it can be concluded that in the assessment of whether an undertaking is a gatekeeper authorities ought to determine, among other factors, if a failure to deal with the buyer implies that: i) the supplier has to access end consumers through inferior sale channels, for example a weaker distributor;³⁷³ ii) forgoes substantial economies of scale or network effects;³⁷⁴ iii) the buyer counts for a large share of the purchases upstream market;³⁷⁵ iv) the presence of much smaller buyers acting in the same market;³⁷⁶ v) and the presence of entry barriers preventing upstream circumventing the powerful buyer by sponsoring new distribution channels.

1.5.2.5. *Alternative supply sources*

The assessment of alternative supply sources is the last assessment tool used in connection to buyer market power measurement as suggested by authoritative sources and recognized by the EU case law in *Tomra and Others v Commission*.³⁷⁷ This measurement describes whether a party has or not substantive *bargaining* power, as suggested by both the OECD and the OFT.³⁷⁸ In the case of monopsony power alternative supply sources are not an important assessment tool

³⁷¹ Commission Decision of 17 November 2010 declaring a concentration compatible with the internal market and the functioning of the EEA Agreement (Case COMP/M.5658 — Unilever/Sara Lee Body Care) non-summarized version, para 200.

³⁷² Summary of Commission Decision of 17 November 2010 declaring a concentration compatible with the internal market and the functioning of the EEA Agreement (Case COMP/M.5658 — Unilever/Sara Lee Body Care) (OJ. 28.1.2012 C 23/30), para 44.

³⁷³ Office of Fair Trading, *The competitive effects of buyer groups* para 1.21; Kokkoris and Day [2009] 180.

³⁷⁴ Office of Fair Trading, *The competitive effects of buyer groups* para 1.21.

³⁷⁵ Gorrie [2006] 218.

³⁷⁶ Office of Fair Trading, *The competitive effects of buyer groups* para 1.21; OECD, *Policy Roundtables: Monopsony and Buyer Power* 42.

³⁷⁷ Commission Decision relating to proceedings under Article [102] TFEU COMP/E-1/38.113 – *Prokent-Tomra* (unabridged version), para 89..

³⁷⁸ Office of Fair Trading, *Assessment of market power: Understanding competition law* 24; Office of Fair Trading, *The competitive effects of buyer groups*; OECD, *Policy Roundtables: Monopsony and Buyer Power* 42

because the withholding effect will take place regardless of outside options for the buyer. Thus, threatening to acquire input from a different supplier does not capture this effect.

If the buyer can within a reasonable timeframe credible threat or switch to “alternative suppliers, sponsor new entry, or self-supply without incurring substantial costs”,³⁷⁹ it will be a buyer power indicator. In its absence buyers will be dependent on its supplier as clarified by the GC in *Cementbouw Handel & Industrie v Commission*.³⁸⁰ The more alternative supply sources the buyer has, the more bargaining room vis-à-vis its supplier for obtaining better trading terms, and vice versa. This means that alternative supply sources are measured by reference to the buyer’s options. Unlike the hypothetical monopsonist test measuring demand side substitutability, the analysis is centered in alternative supply sources for the buyer and not alternative buyers for the seller. Also, measuring alternative supply sources is different from buyer substitution in the sense that for the latter what is measured is the capacity of new buyers to timely and effectively start purchasing the input.

The EU Horizontal Merger Guidelines also consider alternative supply sources when assessing countervailing buyer power.³⁸¹ In my view, however, this should not be interpreted in a restrictive sense as implying that for EU law alternative supply sources are only to be assessed with respect to the analysis of countervailing buyer power. Instead, the interpretation given should that alternative supply sources are a source and way of measuring the undertaking’s buyer power in all cases.

The existence of alternative sources has been taken into account by the EU practice when determining buyer market power in several occasions. In the following paragraphs I discuss the treatment given by the courts to alternative supply sources as a proxy for determining the existence of substantial bargaining power. In most of these cases the analysis of alternative sources of supply is directly linked to the ability of a buyer to exercise countervailing buyer power as recognized by the EU Horizontal Merger Guidelines³⁸² and the GC in *Sun Chemical Group and Others v Commission*.³⁸³

³⁷⁹ Office of Fair Trading, *The competitive effects of buyer groups* para 1.21 and replicated in OECD, *Policy Roundtables: Monopsony and Buyer Power* 42. See also this indicator in International, Competition and Network para 103.

³⁸⁰ T-282/02 - *Cementbouw Handel & Industrie v Commission*, EU:T:2006:64 E.C.R. [2006] II-00319, para 231.

³⁸¹ A source of buyer power “would be if a customer could credibly threaten to resort, within a reasonable timeframe, to **alternative sources** of supply”, Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, para 65 (emphasis added).

³⁸² “Countervailing buyer power in this context should be understood as the bargaining strength that the buyer has vis-à-vis the seller in commercial negotiations due to its size, its commercial significance to the seller and its ability to switch to alternative suppliers”, in Guidelines on the assessment of horizontal mergers under the Council Regulation on the control of concentrations between undertakings [2004] OJ C31/5, para 65.

³⁸³ T-282/06 - *Sun Chemical Group and Others v Commission*, EU:T:2007:203 E.C.R. [2007] II-02149, para 210.

In *Tomra and Others v Commission* it was expressly remarked that alternative supply sources are one of the two *alternative* conditions for buyer power to exist.³⁸⁴ In *Cementbouw Handel & Industrie v Commission* the GC argued that there are other conditions for the existence of buyer power while maintaining that alternative sources of supply and market concentrations were one of its very relevant sources.³⁸⁵ The GC went on by stating that buyer power can be exercised by an undertaking vis-à-vis its suppliers “if those customers have the ability to resort to credible alternative sources of supply within a reasonable time if the supplier decides to increase its prices or to make the conditions of delivery less favourable.”³⁸⁶

In *Irish Sugar v Commission* a defence claiming countervailing buyer power was rejected by the Commission and ratified by the GC because, *inter alia*, the customers of Irish Sugar, despite having some degree of buyer power, were said to be dependent of Irish Sugar because of the reduced volume of alternative supply sources due to the anticompetitive tactics employed by Irish Sugar.³⁸⁷ The Commission’s argumentation links dependency with lack of alternative supply sources as the lack of the former strengthens the supplier’s dependency vis-à-vis the buyer. The less alternative supply sources the less a buyer can threaten a supplier to switch its purchase orders to a competitor.

Lastly, in *Alrosa v Commission* the issue of limiting access to alternative supply sources by a dominant purchaser was dealt with by the GC. The controversy did not deal with alternative sources of supply as granting buyer power to an undertaking but, instead, of a dominant buyer that by limiting access of other buyers to alternative supply sources limits access to input by its purchasing competitors. In this case the Commission adopted a Commitment Decision in which De Beers, at the time the largest rough diamond buyer and supplier in the world,³⁸⁸ agreed not to purchase rough diamonds from Alrosa any longer as the purchasing relation between them reduced access to a “viable source of alternative supply of rough diamonds for potential consumers”,³⁸⁹ and secondly, it could hinder the “second biggest competitor from competing fully with De Beers”.³⁹⁰ This Commission Decision was challenged by ALROSA because, *inter*

³⁸⁴ The second condition being “that customers are able to sponsor new entrants”, Commission Decision relating to proceedings under Article [102] TFEU COMP/E-1/38.113 – *Prokent-Tomra* (unabridged version), para 89. Arguably, the alternative conditions pointed out by the Commission are part of the strategic advantages. Cf with Ezrachi and Ioannidou are of the opinion that there are 2 types of sources of buyer power: i) dominance *or* ii) strategic advantages.

³⁸⁵ T-282/02 - *Cementbouw Handel & Industrie v Commission*, EU:T:2006:64 E.C.R. [2006] II-00319, para 232.

³⁸⁶ T-282/02 - *Cementbouw Handel & Industrie v Commission*, EU:T:2006:64 E.C.R. [2006] II-00319, para 230.

³⁸⁷ Commission Decision relating to a proceeding pursuant to Article [101] TFEU IV/34.621, 35.059/F-3 — *Irish Sugar plc* [1997] OJ L/258, para 107.

³⁸⁸ De Beers up to date is also the largest undertaking in the world market of rough diamond.

³⁸⁹ Commission Decision, relating to a proceeding pursuant to Article [102] TFEU COMP/B-2/38.381– *De Beers* [2006], para 1.

³⁹⁰ Commission Decision, relating to a proceeding pursuant to Article [102] TFEU COMP/B-2/38.381– *De Beers* [2006], para 1.

alia, it imposed a purchasing prohibition of an indefinite time and not proportional. In this case De Beers as a buyer of rough diamonds was limiting supply sources to other buyers in order to strengthen its buyer power by entering into a quasi-exclusivity supply agreement with Alrosa. This tactic of tying exclusive supply to a specific buyer had a foreclosure effect. Consequently, the commitment obliging De Beers not to buy from ALROSA aimed at providing “third parties with an alternative source of supply.”³⁹¹ The GC found that if a dominant buyer nullifies supply alternatives for other buyers these lose any bargaining power they could have and access to input. As noted by the GC if a purchaser in a dominant position “*reserve(s) to itself the whole of Alrosa’s production exported outside the CIS (such practice) could, even if the latter consented, constitute an abuse in the context of their relations.*”³⁹² To prevent such abuse a suitable alternative in the eyes of the GC would be to prohibit parties from entering into exclusive purchasing agreements or reserving a material part of the purchases for the dominant undertaking, but without necessarily prohibiting all purchases from a party to a supplier indefinitely.³⁹³

1.6. Alternatives to buyer market definition

In opposition to the analysis of the market and later assessment of buyer market power the literature has different methods to directly measure market power (in general and also related to buyer power). There is lack of consensus on the suitability of direct market power assessment and legally speaking there is no express recognition of these alternatives for the measurement of it.³⁹⁴ This section looks at two of these alternatives from a buyer’s perspective.

1.6.1. Direct market assessment: the Lerner Index

The Lerner Index allows for direct market power assessment based on the elasticities of supply and demand of an undertaking.³⁹⁵ In principle, this index can be applied to all market forms and has a sound foundation in economic theory.³⁹⁶ The index represents the price-marginal cost

³⁹¹ T-170/06 - *Alrosa v Commission*, EU:T:2007:220, E.C.R. [2007] II-02601, para 119.

³⁹² T-170/06 - *Alrosa v Commission*, EU:T:2007:220, E.C.R. [2007] II-02601, para 127 (emphasis added).

³⁹³ T-170/06 - *Alrosa v Commission*, EU:T:2007:220, E.C.R. [2007] II-02601, para 128. On appeal the ECJ reverted the GC’s Judgment as it found that in the case of Commitment Decisions the extent of the principle of proportionality is substantially lower than in not committed decisions, in C-441/07 P - *Commission v Alrosa*, EU:C:2010:377 E.C.R. [2010] I-05949.

³⁹⁴ Monti, ‘The Concept of Dominance in Article 82’ [2006] 34

³⁹⁵ The Lerner Index was first developed Abraham Ptachya Lerner, ‘The Concept of Monopoly and the Measurement of Monopoly Power’ 1 *The Review of Economic Studies* [1934]; Roger J. van den Bergh and Peter D. Camesasca, *European competition law and economics : a comparative perspective* (Intersentia 2001) 94 to 95

³⁹⁶ Schwalbe and Zimmer, 51. See also: Niels, Jenkins and Kavanagh, 131 to 132.

margin and is defined as $L = \frac{P-MC}{P}$. The Lerner Index also equates the inverse of the price elasticity of the demand of the firm and it is represented as $L_i = \frac{P_i - MC_i}{P_i} = \frac{-1}{\varepsilon_i}$.³⁹⁷

The Lerner Index provides a measure of market power based on the elasticity of the goods commercialized by the undertaking by determining its residual demand.³⁹⁸ First, it describes the ability of a firm to raise its price above short marginal costs, and secondly it implies that market power is inversely related to the elasticity of demand that a firm faces. The more elasticity then the price-marginal cost marginal cost will be low and vice versa.³⁹⁹ In practice, the Lerner Index will indicate how much in percentage the demand of good A will decrease if the price of it increases by 1%.⁴⁰⁰ The more elastic the demand is, the lower the market power of the undertaking will be.⁴⁰¹

A *reverse* Lerner Index could be employed to directly assess the market power of a buying undertaking. In this case the elasticity will determine the change that takes place when the buyer decreases its purchasing price and how this affects the quantity supplied by undertakings in the input market. The less a decrease in price decreases the quantity supplied to the undertaking the more market power the firm has.

Despite its simplicity and intuitive appeal, the Lerner Index has not been adopted as the methodology for market definition due to several criticisms. Firstly, it is very difficult estimating the competitive price⁴⁰² and the marginal cost.⁴⁰³ The Lerner Index indicates the deviation of price from marginal cost at current output, but not necessarily the deviation from the competitive price.⁴⁰⁴ Secondly, it is considered incorrect equating marginal costs to the competitive price. Also, the Lerner Index assumes that high costs preclude dominance but high costs are precisely inherent to monopoly/monopsony power.⁴⁰⁵ Thirdly, the Lerner Index only holds true for an undertaking producing a single product but most firms produce more than one product. Fourthly, the Lerner Index supposes that firms are choosing their prices to maximize short-term profits

³⁹⁷ Bishop and Walker, 89.

³⁹⁸ Hovenkamp, 134.

³⁹⁹ Bishop and Walker, 89.

⁴⁰⁰ OECD, 'Policy Roundtables: Market Definition' [2012] 25.

⁴⁰¹ The intuition is simple: if demand decreases very little in comparison with the price increase, then the firm is dominant as its pricing conduct has an appreciable effect in the market price.

⁴⁰² OECD, 'Policy Roundtables: Market Definition' [2012] 26. Also stressing the difficulty of calculating elasticities see Coate and Fischer [2014] 13.

⁴⁰³ Motta, 116; Schwalbe and Zimmer, 57.

⁴⁰⁴ Areeda, Hovenkamp and Solow, 118 to 119.

⁴⁰⁵ Motta, 116.

instead of a long term.⁴⁰⁶ Fifthly, direct market definition might on occasions be more accurate but it improves accuracy at the expense of legal certainty.⁴⁰⁷

1.6.2. Buyer Power Index

The Buyer Power Index (“BPI”), a methodology developed by Blair and Harrison for the direct measure of buyer market power, is based on the reverse application of the Lerner Index. It shows the deviation between the competitive outcome and the amount purchased by the monopsonist based on the *elasticity of supply*.⁴⁰⁸ The BPI could represent an attractive tool for measuring buyer power as it “suggest a way of thinking about buying power that is easy to understand and useful in application”.⁴⁰⁹ However, its application in practice is not as simple as it sounds.

In a pure monopsony scenario the monopsonist will purchase a quantity that is the intersection of marginal product with the marginal factor cost (VMP=MFC). The BPI formula written as $BPI = \frac{1}{\epsilon}$ “measures the responsiveness of the quantity supplied to changes in price. As ϵ rises, the firm’s monopsony power declines”.⁴¹⁰ In less technical terms, the more buyer power the firm has, the less alternative buyers the sellers will have to offer their products.

The BPI determines the buyer power of a dominant non-monopsonistic buyer, this is a dominant firm that imposes monopsonistic losses but it is not the only buyer. The buying competitors, fringe buyers, are supposed to accept the price that the dominant buyer pays as the market price maker.⁴¹¹ These fringe firms will buy input until their demand equals the set price. To maximize its profit the dominant buyer will adjust its purchase so that it buys a “ Q^*_{df} where mfc equals D_{df} , which determines price equal to w^* from the residual supply. As a price of w^* , sellers will provide q^* , which is equal to the sum of Q^*_{f} and Q^*_{df} ”.⁴¹²

The BPI for a dominant buyer is derived by Blair and Harrison in the following expression:

$$BPI = \frac{1}{\epsilon_{DB}} = \frac{1}{\frac{\epsilon + n(1-s)}{s}} = \frac{s}{\epsilon + n(1-s)}$$

The amount of BPI will depend on the overall elasticity of supply (ϵ) and the elasticity of demand (n) for the fringe competitors as well as the dominant buyer’s market share.⁴¹³

⁴⁰⁶ Bishop and Walker, 89 to 90.

⁴⁰⁷ OECD, ‘Policy Roundtables: Market Definition’ [2012] 13.

⁴⁰⁸ Blair and Harrison, 54 to 67; OECD, *Policy Roundtables: Monopsony and Buyer Power* 32 to 34.

⁴⁰⁹ Blair and Harrison, 64.

⁴¹⁰ Ibid 55.

⁴¹¹ Ibid 56.

⁴¹² Ibid 56.

⁴¹³ Ibid 58.

The BPI bases the market power of a dominant firm on two main variables: elasticities and market shares, in line with the general economics of monopsony. Market shares are an important variable. In the proposed model if all else remains constant, buyer power will increase as the market share of the dominant firm also increases.⁴¹⁴ This is consistent with case law and administrative practice EU competition law concerning with assessment of market shares.

The elasticity of supply measures the response on the quantity offered by suppliers when there is a change in purchasing price. The more elastic the supply is, the less the BPI. As “the quantity supplied becomes more responsive to changes in price, the large buyer’s power falls. This is because the suppliers can redirect the efforts to other products where prices may be higher”.⁴¹⁵ The elasticity of *fringe demand*, this is, of the smaller buyers, as it increases the buying power of the dominant undertaking tends to fall. The intuition behind this is that “any reduction in price implemented by the dominant buyer’s curtailed purchases is tempered by the enhanced purchases of the fringe. The more responsive they are to price decreases, the more difficult is for the dominant buyer to make such a decrease stick”.⁴¹⁶

If all three variables point in the same direction it is arguably easy to determine the existence of substantial buyer power. When the market share are large, supply is inelastic and fringe demand is also inelastic, then the BPI index is expected to be high.⁴¹⁷

Criticism against the BPI

In general, most of the criticism formulated against the Lerner Index can be applied by analogy to the BPI as both mechanisms are based on the relation between elasticity and market share. Firstly, the BPI sacrifices legal certainty to promote a case by case accuracy. The large amount of data that is required to determine the BPI of a case makes prediction and planning of future behavior by undertakings difficult. Secondly, accurate assessment of elasticities of supply and demand is a difficult practical exercise requiring a great deal of data and expertise. Thirdly, no guideline nor legal source (either soft or hard law) suggest or requires the BPI to be applied to any case. Also, the examples offered by Blair and Harrison of similar techniques are, in my view, application of law & economics methodology in general rather than BPI applications.⁴¹⁸ Fourthly, Blair and Harrison do not provide a hierarchy of importance between the variables to consider. This leads to the question of which factor should prevail in case of a discrepancy between them? The balancing order is not clear and a different hierarchy might lead to different outcomes for a same case.

⁴¹⁴ Ibid 58.

⁴¹⁵ Ibid 58.

⁴¹⁶ Ibid 59.

⁴¹⁷ Ibid 67.

⁴¹⁸ See the cases mentioned in *ibid*. The three cases put forward by these authors were not strict buyer power cases but rather merger cases dealing with sellers.

1.7. Conclusion

This paper has illustrated the importance of revisiting traditional views concerning purchasing market definition because of the particularities of purchasing markets that difference them to standard selling-side cases. Buyer power market are different because the incentives and economics of purchasing respond to different factors that require specific methodologies and reinterpretation of traditional concepts. Also, in this paper I have stressed the fact that substantive buyer market power – but not necessarily dominance – may rise at lower levels of market shares and concentrations than on seller-side cases.

Because of buyer market definition's particularities I have proposed adopting a dualistic market definition methodology for all buyer power cases, and not limited to a selection of them. A dualistic approach allows for the measurement of both monopsony power as well as bargaining power, covering buyer power as a whole. Also, this proposal goes one step further than the traditional reverse approach advocated by the Notice on Market Definition because it lacks detail and a one side-approach is simplistic. This implies that for the market definition and the subsequent assessment of the undertaking's market power the analysis must be made in both the upstream and upstream markets wherein the undertaking carries out its economic activity. A dualistic approach fully captures the buyer power implications for procuring markets and serves as the starting point to assess the competitive effects of the behavior of an undertaking vis-à-vis its suppliers and downstream vis-à-vis end consumers. Moreover, it has been shown that not only the literature, soft law instruments issued by the Commission but also the EU case law increasingly support the adoption of this dualistic approach.

Regarding the relevant market definition I submit that a mere reverse of the SSNIP test – the Buyer's SNNIP test – is insufficient; instead some adjustments and re-interpretation of traditional concepts such as demand substitution and buyer substitution ought to be taken into account. Part of these pure reverse methodology deficiencies have been taken into account and addressed by other authoritative sources in the form of Guidance Papers from the Commission, the OECD and NCAs. These authoritative sources modernize the previous state of the soft law and are a good step forward but are still too timid as they mostly tend to capture half pictures when only focusing on the upstream market definition or make a dual approach dependent on additional circumstances. An additional downstream market definition is required to properly assess the market power and competitive effects of the undertaking's behavior. In this paper I have also highlighted that the dualistic approach may fall into deficiencies that have to be taken into account when performing the case-by-case assessment. The dualistic approach is not perfect, but it is a better suited tool than the mere reverse SSNIP test or the buyer oriented exclusive *hypothetical monopsonist test*.

Concerning buyer market power assessment I also propose adopting a dualistic approach. I discussed that buyer market power is essentially the equivalent to seller market power with the important difference that buyer market power may arise in circumstances in which seller market power would not be substantive; i.e.: at a lower threshold. This is due to that in a trade relationship is the buyer the one that tends to enjoy the “leadership” of the negotiation and is the one that, ultimately, decides what to buy, when, from whom and which quantities. This finding has been ratified by the Commission’s practice and the case law, in the doctrines of unavoidable trading partner and dependency. Concerning the dualistic approach for the market power assessment I submitted that this measurement will look at the undertaking’s market power upstream and downstream, fully capturing the competitive effects of the behavior in question. By adopting this approach it is possible to fully assess the aggregated consumer welfare implications of buyer power as it centers its attention not only on the effects upstream market – the traditional focus of monopsony theory - but it integrates the effects downstream reflecting bargaining power effects. By taking this approach the assessment takes into account “the *relevant market conditions*, and in particular of the *dynamics of the market* and of the extent to which products are differentiated”,⁴¹⁹ in accordance to EU competition law.

To assess the market power of a purchasing undertaking the traditional measurement tools used in competition law can be used – market shares, market concentration, barriers of entry or exit, etc – and in addition attention ought to be paid to more buyer-specific ones: whether the undertaking is either an unavoidable trading partner and/or suppliers are dependent on it, if it acts as gatekeeper downstream market and what alternative supply sources buyers have. These measurement tools are connected with the sources of buyer power but measure not its existence, but rather its degree.

This paper has also discussed the use of market share thresholds for buyer power cases. Concerning dominant I discussed whether the test for buying undertakings has to be symmetrical to seller oriented cases. In the light of the relatively small amount of case law, with the exception of *British Airways v Commission*,⁴²⁰ it is difficult to give a definitive answer if under the current state of the law the abuse of a dominant purchasing position has a lower threshold than abuse of a selling dominant position. In my view, and in accordance to the economics of buyer power, a lower threshold for dominance is reasonable if the undertaking also enjoys substantive market power (not necessarily accruing to dominance) in the related downstream market, fitting the hourglass shape. This should not be interpreted indicating that in such cases there is also a presumption of breach of Art. 102 TFEU. The legal developments in some Member States with

⁴¹⁹ Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings [2009] OJ C 45/7, para 14 (emphasis added).

⁴²⁰ T-219/99 - *British Airways v Commission*, EU:T:2003:343 E.C.R. [2003] II-05917; and C-95/04P - *British Airways v Commission*, EU:C:2007:166 E.C.R. [2007] I-02331.

regard to food retailing appear to suggest that, at least regarding specific market structures, there is a tendency to consider that dominance as a buyer – with or without market power downstream – in national law can be found even at very low thresholds as far as to 30%, such as in the case of Finland.⁴²¹

In opposition to a structural approach to the assessment of market power I discussed two alternatives for the direct measurement of buyer market power: the reverse Lerner Index and the BPI. These indicators could be used to a limited extent as additional tools to reinforce the analysis of the relevant market and the market power assessment. However, in my view these tools from a legal perspective have not been recognized by the case law neither as soft law nor strong authoritative sources nor have been employed the Commission's practice in buyer power cases this far. Therefore, its usage should be met with cautious.

In sum, up to date EU case law sheds little light on how the market definition for buyer power cases ought to be made. Most of the analysis is left to authoritative sources such as the Commission's instruments that, despite being soft law instruments, have received recognition by the EU judiciary as valuable guiding instruments. These instruments have gradually started to recognize the differences in defining buying markets vis-à-vis selling markets but there is still more efforts to do as to incorporate and update the instruments to fully capture a dualistic market definition approach to buyer power cases. The tendency appears to support this claim. In this sense I wait for the development of the Commission's Guidelines and see whether some of the recommendations suggested in this paper are incorporated in their instruments in case of future revisions.

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⁴²¹ Competition Act (No 948/2011), last ammended in 2014, Section 4a

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